Supreme Court, U.S.
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In The

Supreme Court of the United States

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Petitioner,

v.

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDTSON, on behalf of themselves and all others who consent to become plaintiffs and similarly-situated employees,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Through decades of labor legislation, including the National Labor Relations Act, 29 U.S.C. §151 *et seq.* ("NLRA"), the Labor Management Relations Act, 29 U.S.C. §§141-97 ("LMRA"), and the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA"), Congress has extolled the sanctity of the collective bargaining process and made the promotion of collective bargaining a central legislative goal. To best achieve this objective, Congress made management of collective bargaining exclusively subject to federal law. In that same spirit, Congress passed Section 203(o) of the FLSA, 29 U.S.C. §203(o) ("Section 203(o)"), which specifically authorizes representatives of labor and management, through collective bargaining, to agree to forgo compensation for clothes-changing time ("Clothes-Changing Time") that any law might otherwise require. Here, pursuant to this statutory scheme, Petitioner Kraft Foods Global, Inc., Oscar Mayer Foods Division ("Kraft") and its union, the United Food and Commercial Workers Union, Local 538 (the "Union") determined more than 25 years ago that it was in their common best interests to forgo such compensation in exchange for higher employee wages and other perquisites. In light of these facts, the question presented is:

QUESTION PRESENTED – Continued

Where FLSA Section 203(o) specifically allows unions and employers to resolve through their collective bargaining agreements ("CBAs") the issue of whether Clothes-Changing Time must be compensated, can a state law or municipal ordinance interfere with such agreements, or does federal law preempt state laws and municipal ordinances that would otherwise override such terms?

LIST OF PARTIES AND RULE 29.6 STATEMENT

This is a petition ("Petition") of a decision in a suit brought as a class action by four named plaintiffs (the "Named Plaintiffs") on behalf of themselves and a class of 782 members who have designated the Named Plaintiffs and class counsel as their representatives in this litigation. By this Petition, Kraft challenges the order below as to the entire class.

The caption contains the names of all the Named Plaintiffs as well as of the Petitioner.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that Kraft Foods Global, Inc. is a wholly-owned subsidiary of Kraft Foods, Inc., which is a publicly-held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Kraft respectfully petitions for a writ of certiorari to review the decision ("Decision") of the United States Court of Appeals for The Seventh Circuit affirming the judgment by the United States District Court for the Western District of Wisconsin ("District Court"), which held that Kraft, pursuant to Wisconsin's minimum wage and overtime law, must pay employees in Wisconsin for all Clothes-Changing Time, despite having agreed with its Union for more than 25 years to forgo such compensation in exchange for higher employee wages and other perquisites and despite controlling federal law that preempts such Wisconsin law.

OPINIONS BELOW

The Memorandum Opinion of the Seventh Circuit (Appendix ("A") 1-8) is reported at 614 F.3d 427 (7th Cir. 2010). The District Court Opinion and Order dated June 17, 2009 is reported at 626 F. Supp. 2d 913 (W.D. Wis. 2009) (A9-28). The District Court's Order denying Kraft's motion for summary judgment is published at 527 F. Supp. 2d 860 (W.D. Wis. 2007) (A29-58).

JURISDICTION

The Seventh Circuit entered its Order on August 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

(1) NLRA §7, 29 U.S.C. §151 (A59-60);

(2) 29 U.S.C. §157 (A61);

(3) 29 U.S.C. §158 (A61-63);

(4) LMRA §301, 29 U.S.C. §185(a) (A63);

(5) FLSA §203(l), 29 U.S.C. §203(l) (A64-65);

(6) FLSA §203(o), 29 U.S.C. §203(o) (A66);

(7) FLSA §206(a)(1), 29 U.S.C. §206(a)(1) (A66-67);

(8) FLSA §207(a)(1), (2), 29 U.S.C. §207(a)(1), (2) (A67-68);

(9) FLSA §218(a), 29 U.S.C. §218(a) (A68-69);

(10) Wis. Stat. §103.02 (A70);

(11) Wis. Stat. §109.03 (A71-72);

(12) Wis. Admin. Code DWD §272.12 (A73); and

(13) Wis. Admin. Code DWD §274.03 (A74).

STATEMENT OF THE CASE

I. Facts Material To The Question Presented.

Kraft operates a meat-processing plant in Madison, Wisconsin (Kraft's "Facility"). (Plaintiffs' and Defendants' Joint Proposed Stipulation of Facts and Conclusions of Law, A79-93, ¶1, A79). The Named Plaintiffs represent a class of 782 of the Facility's hourly employees. (A82-83).

A. To Comply With Kraft's Standards And Applicable Law, Facility Workers Wear Certain Clothing To Promote Safety And Hygiene.

As a processor of food products, Kraft must comply with certain U.S. federal regulations. In addition, as an employer, Kraft must follow safety and health regulations promulgated under the Occupational Safety & Health Act. Kraft has implemented its own Sanitation Standard Operating Procedures and uses Good Manufacturing Procedures to reduce the likelihood of introducing contaminants to food products and the manufacturing process. (A83). Kraft additionally has its own safety policies which dictate the articles that employees must wear in performing their duties. (A83).

The only articles required by Kraft to be put on before the work shift and taken off after that shift by Respondents are captive footwear, such as shoe rubbers; over-the-calf rubber boots or work boots; hair nets; beard nets (if an employee has a beard);

hardhats or bump caps; and frocks or career clothing (collectively, "Articles"). (A84-86).

B. For More Than 25 Years, Kraft And The Union Have Agreed Through Collective Bargaining That It Serves Their Common Best Interests To Forgo Compensation For Clothes-Changing Time.

In 1956, the Union and Kraft (or its predecessors) began to expressly negotiate whether the Company would compensate Respondents for time spent donning and doffing Articles ("Clothes-Changing Compensation"). The 1956 CBA added 12 minutes per day for the time each employee spent changing clothes incident to employment, which time would be added to the employees' daily work time (the "Clothes-Changing Provision"). An essentially identical Clothes-Changing Provision remained in each CBA until 1985. (A90-91).

During negotiations in 1984, Kraft sought to delete the CBA's Clothes-Changing Provision, but the Union rejected this proposal. (A90-91). After extensive but failed negotiations, Kraft declared an impasse and implemented a wage reduction from $10.69/hour to $8.25/hour. All other CBA provisions remained intact, including the Clothes-Changing Provision. (A91).

In early 1985 – after additional negotiations – Kraft proposed a wage increase up to $10.00/hour in

return for a reduction in benefits, including elimination of the Clothes-Changing Provision. On May 12, 1985, the Union's members ratified the proposal. (A91).

Twice since then – in 1986 and 1989 – the Union sought unsuccessfully to reinstate the Clothes-Changing Provision. (A91). The Union otherwise has not subsequently sought any Clothes-Changing Compensation. Since 1985, Kraft has not paid Clothes-Changing Compensation to its employees. (A91-92).

C. Respondents Sue, Claiming That Wisconsin Law Overrides The CBA's Treatment Of Clothes-Changing Time.

Plaintiffs sued in the District Court on May 30, 2007, alleging that Kraft violated federal and state law by failing to compensate them for Clothes-Changing Time. They contended that Clothes-Changing Time constituted "hours worked" under Wisconsin's Wage and Overtime Statutes, Wis. Stat. §§103.02 & 109.03, and implementing regulations and required compensation notwithstanding any contrary CBA provision.

In September 2007, Kraft moved for summary judgment on several theories, including that Section 203(o) applied because the CBA expressly excluded compensation for Clothes-Changing Time. Kraft specifically argued that federal law preempted Plaintiffs' state law claims under several distinct theories.

D. The Courts Below Rule That States And Municipalities May Override CBA Provisions Regarding Clothes-Changing Compensation.

Although Plaintiffs stipulated to all of Kraft's proposed findings in support of its motion for summary judgment, the District Court denied that motion. The District Court held that it could not determine as a matter of law whether the Articles were "clothes" for purposes of Section 203(o). Since it was not certain that the federal statute applied, the District Court concurrently found it could not address preemption.

Thereafter, the parties completed discovery. Kraft requested leave to submit a renewed motion for summary judgment, but the District Court denied the request.

The District Court granted Respondents' motion for class certification on May 6, 2008, and the parties prepared for trial.

In Summer 2008, shortly before trial was to begin, the parties entered mediation. In a resulting settlement, the parties agreed to submit joint findings of fact and legal briefing upon which the District Court would decide the case. In addition, Kraft agreed to limit its arguments regarding Respondents' FLSA claim to whether Section 203(o) applied and, if so, to limit its arguments whether Respondents' state law claims were preempted by federal law. Kraft agreed

not to proceed on its other defenses in exchange for Respondents' agreement to limit their claim.

The parties then submitted stipulated joint findings of fact on September 8, 2008. The District Court approved the settlement on February 12, 2009, and Kraft and Respondents cross-moved for judgment based on stipulated facts.

The District Court again ruled in favor of Respondents on June 17, 2009, but on different grounds. While the District Court noted that, since its initial decision, the law had evolved regarding whether the Articles were "clothes" for purposes of Section 203(o), it determined that it "need not resolve" the applicability of Section 203(o) because it had no preemptive effect. (A20).

The District Court concluded that states and municipalities have authority to "give workers more rights than they would be entitled to under federal law," even where Section 203(o) expressly provides that the CBA "shall" control the question of Clothes-Changing Compensation.

Kraft timely appealed to the Seventh Circuit. After briefing and argument, on August 2, 2010, in a seven-page opinion that did not address Kraft's theories of preemption, the Seventh Circuit affirmed the District Court and rejected the contention that state or local law was preempted. (A1-8).

II. The District Court Properly Exercised Federal Jurisdiction.

The District Court exercised jurisdiction under 28 U.S.C. §§1331 and 1337 for claims arising under the FLSA. The District Court exercised jurisdiction under 28 U.S.C. §1367(a) for the ancillary state claims.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because This Case Presents A Question Of Exceptional National Importance.

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), this Court explained the "continuous workday rule" required employers to pay workers for all time spent following the first principal activity of the day and until the final principal activity of the day. In *Alvarez,* the first principal activity was the donning of "integral and indispensable" safety gear, and the final principal activity was the doffing of such gear. The *Alvarez* parties had specifically agreed that the donning and doffing involved were principal activities. This Court did not address whether Section 203(o) applied to the donning or doffing, as neither party raised the issue. Nor did this Court address whether Section 203(o) preempts efforts by states or municipalities to require Clothes-Changing Compensation when, pursuant to that Section, unions and employers by CBA have agreed to forgo such

compensation. *Alvarez* has since spawned hundreds of cases disputing the scope of Section 203(o).

Although a number of federal appellate courts have addressed the applicability of Section 203(o), the preemption issue had not been addressed previously before the Seventh Circuit issued its Decision in this case.[1] The preemption issue remains vitally important to American labor and management.

For more than 75 years, Congress has made it a pillar of American labor policy to promote collective bargaining, having concluded that it promotes employees' standard of living, is fairest to employers and employees and best allows labor and management to resolve issues particular to their industry. Congress has directed that the interpretation and administration of CBAs be subject exclusively to federal law.

In Section 203(o), in particular, Congress determined that it was best to defer to the determination of individual unions and employers through their CBAs as to how to resolve the contentious issue of Clothes-Changing Compensation. Now, however, the Decision establishes a dangerous precedent that threatens to undermine these key federal goals by allowing local laws to override settled collective bargaining decisions, in direct conflict to what federal law intends. This Court should grant Kraft's Petition

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[1] The Seventh Circuit recognized that the preemption issue is one of first impression. (A5).

to provide clear guidance that such state and municipal intrusions are preempted. Indeed, preemption is required under several independent doctrines, including Section 301 of the LMRA, 29 U.S.C. §185, the doctrine of conflict preemption and the doctrine of preemption established by *Building and Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*"), including this Court's decision applying the *Garmon* doctrine under similar circumstances in *Wisconsin Dept. of Industry Labor and Human Relations v. Gould*, 475 U.S. 282 (1988) ("*Gould*").

If left to stand, the Decision will undermine the very collective bargaining process Congress intended to protect and cause other harms that Congress sought to avoid.[2]

For these reasons, this Petition amply satisfies Supreme Court Rule 10(c), as it presents a matter where a United States Court of Appeals has both "decided an important question of federal law that has not been, but should be settled by this Court," and "has decided an important federal question in a

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[2] This Court's denial of the petition for certiorari filed in *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217 (4th Cir. 2009), *cert. denied*, 2010 WL 2420333 (Oct. 4, 2010) ("*Sepulveda*"), does not detract from the merits of Kraft's Petition. *Sepulveda* determined that donning and doffing protective or safety gear constitutes "changing clothes" for purposes of Section 203(o), a question entirely distinct from the preemption issues raised here.

way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

A. For Decades, Congress Has Extolled The Sanctity Of Collective Bargaining And Directed That It Be Regulated Exclusively By Federal Law.

1. The NLRA

In passing the NLRA, Congress determined that collective bargaining "safeguards commerce from injury" and declared it to be national policy to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. §151. That section provides:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred

> by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

To implement that policy, Congress mandated that employees "shall" have the right to organize and collectively bargain. NLRA Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. §157.

In interpreting the NLRA, this Court has acknowledged Congress' desire to allow matters of vital concern to labor and management to be resolved through collective bargaining. *E.g., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."). This Court

reaffirmed recently in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1464-65 (2009), that CBA terms should be honored unless they violate a federal statute. That decision reaffirmed the deference given to CBAs.

2. The LMRA

In 1947, Congress passed the Taft-Hartley Act, later codified as the LMRA. Congress therein amended the NLRA to restrict certain union activities and to guarantee freedom of speech and conduct for employers and individual employees. Significantly, not only did Congress leave intact the NLRA's commitment to collective bargaining, it provided a statutory framework for conducting collective bargaining in Section 8(d), now codified at 29 U.S.C. §158. That provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id. Section 158 also sets forth procedures that a party to a CBA must follow before it may modify or terminate the contract. *Id.*

This Court has recognized that the LMRA embodies a policy of deferring to collective bargaining decisions:

> [o]ne policy of particular importance – if not the overriding one – was the policy of free, collective bargaining. And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added section 8(d) defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession.' 29 U.S.C. §158(d). *It follows that the parties' agreement primarily determines their relationship.* If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.

Carbon Fuel Co. v. United Mine Workers of Am., 444 U.S. 212, 218 (1979) (citations omitted; emphasis added).

3. The FLSA

The FLSA's history is consistent with Congress' commitment to collective bargaining. Congress passed the FLSA against the backdrop of the Depression, with the intent of protecting workers who were unable to organize. It sought to provide a minimum standard of living for all workers by providing a floor for hourly wages, qualification for overtime, and age of employability (to avoid child labor). Beyond these

discrete issues, Congress did not intend to interfere with collective bargaining, much less to permit state or municipal interference.

In calling for the legislation that would eventually become the FLSA, President Roosevelt emphasized his concern about the "exploitation of *unorganized* labor." His recommendation more fully provides:

> All but the hopelessly reactionary will agree that to preserve our primary resources of man power, *Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of* ***unorganized*** *labor.*

H.R. Doc. No. 75-255, at 2 (1937) (emphasis added).

That the FLSA was meant to support collective bargaining was further evident from a debate between two future Supreme Court Justices, then-United States Attorney General Robert H. Jackson and then-Labor Committee Chairman Hugo L. Black. Attorney General Jackson affirmed that the FLSA "gives effect to collective bargaining, as I understand it. I do not think you are in any danger of collective bargaining reaching a wage below the minimum." *Bills To Provide For The Establishment Of Fair Labor Standards In Employments In And Affecting Interstate Commerce And For Other Purposes: Joint Hearing on S. 2475 and H.R. 7200 Before The Comm. On Education And Labor United States Senate And The Comm. On Labor H. of Rep.*, 75th Cong. 22 (1937) (Statement of Robert H. Jackson).

Other witnesses before Congress echoed that the best way to ensure a minimum quality of life for all workers was through collective bargaining, but acknowledged that many workers lacked access to this protection.

> Some observers have mentioned that all this could and should be done by organized labor unions. . . . It might be a very fine thing if all of our 43,000,000 wage earners were members of well organized and intelligently led unions. No doubt at some very distant time this or something near it may exist. But it will take many years to organize into well-administered unions the great body of wage earners in the United States. We cannot delay for that many years.

Id. at 97 (Statement of Robert Johnson).

As Congress debated the legislation, President Roosevelt told both Houses that, once a floor of acceptable wages and hours was established, it was best to leave the negotiation for better terms to the collective bargaining process:

> No reasonable person seeks a complete uniformity in wages in every part of the United States; nor does any reasonable person seek an immediate and drastic change from the lowest paid to the highest paid. We are seeking, of course, only legislation to end starvation wages and intolerable hours; *more*

> *desirable wages are and should continue to be the product of collective bargaining.*

H.R. Doc. No. 75-458 at 4 (1938) (emphasis added).

B. Congress Passed Section 203(o) To Allow Labor And Management To Resolve A Contentious Issue Through Collective Bargaining.

1. Section 203(o)'s Legislative History Shows That Congress' Primary Intent Was To Defer To Collective Bargaining.

Congress enacted Section 203(o) in 1949 as an amendment to the 1947 Portal-to-Portal Act, 29 U.S.C. §254(a)(2) ("PPA"). Section 203(o)'s legislative history leaves no doubt that Congress intended to allow labor and management representatives to resolve through collective bargaining what otherwise could be a particularly contentious issue – Clothes-Changing Compensation – and, where collective bargaining resolved that issue, to protect that determination from governmental interference.

Section 203(o) arose in response to an ambiguity in the PPA regarding whether Congress intended to allow employers and employees to contract for Clothes-Changing Compensation. Between 1947-49, that ambiguity resulted in claims on behalf of industrial employers that, by some reports, exceeded $1 billion. *See Sepulveda*, 591 F.3d at 217.

To resolve this ambiguity, Representative Christian Herter introduced the amendment that later became Section 203(o). He explained that the amendment was "offered for the purpose of avoiding another series of incidents which led to the Portal-To-Portal Legislation." 95 Cong. Rec. 11433 (1949) (statement of Rep. Herter) (included A75-78). He further observed that unions and employers in different industries had reached diverse outcomes as to whether Clothes-Changing Time was compensable and that the matter was best left to individual CBAs:

> In some of those collective-bargaining agreements the time taken to change clothes . . . is considered part of the working day. In other collective-bargaining agreements, it is not so considered. But, in either case, the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.

Id. (A76).

Representative Herter specifically noted his desire to prevent federal Department of Labor ("DOL") officials from overriding a CBA that had settled this issue:

> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence, the employer must pay for

> back years the time which everybody had considered was excluded as a part of the working day." That situation may arise at any moment. *This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement.*

Id. (emphasis added) (A76). *See Fed. Energy Admin v. Algonquin SNG, Inc.*, 426 U.S. 548, 546 (1976) (holding that "a statement of one of [a statute's] sponsors . . . deserves to be accorded substantial weight in interpreting th[at] statute").

Before proceeding to a vote and in responding to another representative's question, Representative Herter confirmed his understanding that both labor and management desired the amendment. 95 Cong. Rec. 11433 (1949) (Statements of Reps. Lucas and Herter) (A77). The House then approved the Amendment.

A Conference Report reinforced that Section 203(o) was intended to amend the phrase "hours worked" throughout the FLSA once Clothes-Changing Compensation had been resolved by a CBA, stating:

> *for the purposes of minimum wage and maximum hours provisions of the Act*, there would be excluded from "hours worked" any time spent by the employee which was excluded from measured working time under a bona fide collective bargaining agreement

> applicable to him or custom or practice thereunder. A conference agreement limits this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each work day.

H.R. Rep. No. 81-1453, at 16 (1949) (emphasis added).

As the *Sepulveda* court recognized, Section 203(o) represents a judgment that leaving this issue to the CBA process is in employees' best interests: "Like the Portal-To-Portal Act, Section 203(o) reflects Congress's intention to give private parties greater discretion to define the outer limits of the workday." 591 F.3d at 218.

Relying on a 2002 DOL opinion letter, the *Sepulveda* court held:

> And Congress has concluded that employees would be better off if this issue were subject to collective bargaining. For, "[i]t would disserve the workers the Fair Labor Standards Act it meant to protect if employers who wish to introduce . . . more protective gear in the workplace and knew that in doing so, they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear." Fair Labor Standards Act, U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2002-2

> (June 6, 2002).[3] This sort of disincentive to workplace safety is not one that courts should casually introduce, especially in the face of a clear and contrary congressional mandate by section 203(o).

Id.

2. Section 203(o)'s Text Requires Deference To Collective Bargaining.

Section 203(o)'s text reinforces Congress' intention to defer to CBAs concerning Clothes-Changing Compensation. Section 203(o) is set forth in the FLSA's definitions section and provides:

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[3] In the 2002 opinion letter, the DOL noted that Congress passed §203(o) to "give a measure of deference on [Clothes-Changing Compensation] to the agreements and judgment shared by companies and their employees' designated representatives." U.S. DOL, Wage & Hour Div., Adm. Op. Ltr. No. FLSA2002-2 at 3 (June 6, 2002). This was reaffirmed in 2007. U.S. DOL, Wage & Hour Div. Adm. Op. Ltr. FLSA2007-10 (May 14, 2007). However, the DOL has changed its position a number of times in recent years as to what "changing clothes" means for purposes of Section 203(o), an issue not presented in this Petition. On June 16, 2010, the DOL reverted to a position articulated in 1997 and 2001 – that Section 203(o) does not exempt protective gear that is required by law, the employer or the nature of the job. U.S. DOL, Wage & Hour Div., Adm. Interp. No. 2010-2 (June 16, 2010). This vacillation shows how volatile and contentious Section 203(o) is and highlights that a dangerous by-product of the Decision will be to spur a new generation of litigation over whether state law or municipal ordinances supplant Section 203(o).

> As used in this Chapter –
>
> (o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, *there shall be excluded* any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. §203(o) (emphasis added) (A65). Section 203(o) admits of no exception for any law, whether state or federal.

Congress' use of the phrase "*shall* be excluded" shows its specific intent that this issue not be subject to limitation or override by courts or governmental officials. *E.g., Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("shall" is ordinarily "the language of command") (citation omitted). In its Decision, however, the Seventh Circuit did not address the import of Congress' use of this "language of command" in Section 203(o). Yet, Congress' forceful command that CBA decisions as to Clothes-Changing Compensation be protected from governmental interference is plainly undermined if every state and municipal government may freely override such CBA determinations – the effect of the Decision here.

The language that introduces Section 203 – "As used in this Chapter" – shows that each subsection of

Section 203 applies for purposes of construing all other FLSA provisions. Therefore, Section 203(o) modifies the definition of "hours worked" throughout the FLSA when a CBA has addressed Clothes-Changing Compensation by carving out Clothes-Changing Time from what is counted in determining "hours worked." *See Franklin v. Kellogg Co.*, 619 F.3d 604, 611 (6th Cir. 2010) (noting that the "majority of our sister circuits" interpret Section 203(o) not as an *exemption* from the FLSA,[4] "but as an exclusion from the definition of work").

Moreover, most other provisions of the FLSA set forth federal minimum standards as to wages, overtime or age of employability. *See, e.g.,* 29 U.S.C. §206 (minimum wage) (A66); 29 U.S.C. §207(a) ("not longer than" or "in excess of" as to overtime) (A67-68); 29 U.S.C. §203(l) (minimum age requirements) (A64-65). Each such provision anticipates that higher state minimums serve Congress' intent of providing for a better standard of living. By contrast, Section 203(o) does not attempt to set a federal floor that state and local governments may exceed. Instead, it excludes an issue from governmental regulation in its entirety. This reflects Congress' determination that employees and employers alike best prosper if the issue of Clothes-Changing Compensation is protected from

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[4] Exemptions are set forth in FLSA Section 213, 29 U.S.C. §213.

governmental interference once it is resolved by collective bargaining.

C. This Case Illustrates How Allowing CBAs To Resolve The Issue Of Clothes-Changing Compensation Furthers All Parties' Best Interests.

This case illustrates the wisdom of Congress' belief that allowing issues to be resolved through collective bargaining best promotes workers' interests. Workers at Kraft's Facility agreed to forgo 12 minutes per day of Clothes-Changing Compensation in exchange for increased wages for every hour of their workday, resulting in compensation that is well above both the federal and Wisconsin's minimum wage. Kraft's employees have repeatedly reaffirmed the CBA's treatment of Clothes-Changing Compensation for more than 25 years.

A survey of the judicial landscape shows that one of the most litigated issues in American labor law is whether an article is "clothing" for purposes of Section 203(o). Hundreds of lower courts have faced this question. As noted above, the DOL has vacillated on this issue and failed to provide clear guidance.

Section 203(o)'s applicability was at issue in this case as originally filed. However, because subsequent Seventh Circuit precedent left no doubt that the Articles were within Section 203(o), *see Pirant v. U.S. Postal Service*, 542 F.3d 202, 208 (7th Cir. 2008), this Petition does not present any question of what

constitutes "clothing" under Section 203(o). Like the Seventh Circuit, other courts have taken an expansive view of clothing for this purpose. *See, e.g., Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007); *Bejil v. Ethicon, Inc.*, 269 F.3d 477 (5th Cir. 2001) (each deferring to CBA's definition of what constituted "clothing"). Many cases questioning the scope of Section 203(o), however, continue to proceed. If Representative Herter was concerned about $1 billion in claims at the time Section 203(o) was passed, the amounts at issue in today's lawsuits are truly staggering.

Parties' willingness to litigate this issue shows how important it is, and makes it especially important to defer to Congress' desire to allow unions and employers to agree on ways to resolve this issue apart from costly lawsuits.

II. Review Is Warranted Because The Decision Conflicts With This Court's Precedent And Misinterprets Federal Law.

In enacting the major pieces of Twentieth Century labor legislation, Congress intended to protect collective bargaining through a uniform body of federal law. Recognizing this history, this Court has repeatedly held state laws that interfere with such national uniformity are preempted. Here, the language and history of Section 203(o) makes preemption of inconsistent local laws particularly necessary. Nevertheless, in what was merely a seven-page opinion, the

Decision below never addressed any of Kraft's preemption theories. It improperly disregarded several independent bases for federal preemption.

A. LMRA Section 301 Preempts State Laws And Municipal Ordinances That Override CBA Determinations Regarding Clothes-Changing Compensation.

Section 301 states:

> Suits for violation of contracts between an employer and labor organization representing employees in the industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. §185(a) (A63). In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court ruled that the substantive law to apply in Section 301 cases "is federal law, which the courts must fashion from a policy of our national labor laws." *Id.* at 456. As this Court stated, "[Section 301] authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Id.* at 451. This body of federal law, consistent with the NLRB's administration of labor policy, ensures uniform interpretation of such labor contracts and promotes peaceable resolution of legitimate labor disputes. *Id.*

This Court first analyzed the preemptive reach of Section 301 in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), holding:

> The dimensions of [Section] 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by [Section] 301 [are] to be decided according to the precepts of federal labor policy.

Id. at 103. This Court concluded that "in enacting [Section] 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), this Court ruled "the interests in interpretive uniformity and predictability" required that preemption extended not merely to laws affecting the process of collective bargaining but ones that impacted the meaning of CBA terms. *Id.* at 211.

Other courts have held that the preemptive reach of federal law extends beyond express CBA provisions to any "implied rights" created by the "common law of the shop which implements and furnishes the context of the agreement." *Douglas v. Am. Info. Tech. Corp.*, 877 F.2d 565, 572-73 (7th Cir. 1989) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-80 (1960)). Even the Seventh Circuit has held that "if it is necessary to interpret express or implied terms of a CBA, a state law claim is

completely preempted by [Section] 301." *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 499 (7th Cir. 1996).

Here one must interpret the CBA to determine whether the issue of Clothes-Changing Compensation has been resolved "by express terms of or by custom or similar practice under a bona fide collective bargaining agreement." 29 U.S.C. §203(o). Moreover, one must consult that CBA to know what articles constitute "clothes" as to that issue.

Further, application of Wisconsin law as to Clothes-Changing Compensation leads to a different result under state law than under federal law on a key issue identified by Congress. Thus, in Wisconsin, if the Decision below is correct, Kraft and its Union may not agree to forgo Clothes-Changing Compensation through their CBA. In other states, however, Section 203(o) will continue to govern. Thus, uniformity is impossible. The workers at the Wisconsin Facility may receive Clothes-Changing Compensation, while Oscar Mayer employees in a different state, *e.g.*, Iowa, with an identical CBA, may not receive such compensation for donning and doffing the same Articles.

Independent from the CBA's treatment of Clothes-Changing Compensation, a court would have to consult the CBA to determine how properly to apply Wisconsin law, making Section 301 preemption still applicable. Wisconsin wage laws create a right to overtime pay for "hours worked in excess of 40 hours

per week" at "time and one-half the regular rate of pay." Wis. Admin. Code DWD §274.03 (A74). Determining the number of "hours worked" under Wisconsin law requires interpreting the CBA to address even less controversial elements of what constitutes a compensable hour. Wisconsin administrative regulations define "hours worked," Wis. Admin. Code DWD §272.12 (A73), which is not always the same as the time for which employees receive compensation under a CBA. Indeed, the current CBA between Kraft and the Union compensates employees for time that would not necessarily constitute "hours worked" under Wisconsin law, such as sick time, extra hours for unscheduled call-in work, vacations and holidays. Where, as here, a CBA's terms govern an employee's "hours worked" per week, courts have found that Section 301 preempts state law claims. *See Mowry v. United Parcel Serv.*, 415 F.3d 1149, 1157 (10th Cir. 2005) (preempting state wage claim under Section 301 because determining whether plaintiff was underpaid required review of CBA terms).[5]

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[5] Numerous courts have reached the same conclusion regarding preemption of state wage laws under the Railway Labor Act, which is persuasive because the standard for preemption is virtually identical to Section 301's. *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994). *See, e.g., Adames v. Executive Airlines, Inc.*, 258 F.3d 7, 13 (1st Cir. 2001) (overtime claim preempted because determination of hours "worked" and effective hourly wages requires interpretation of CBA).

B. State Laws And Municipal Ordinances That Override CBA Determinations As To Clothes-Changing Time Are Independently Preempted Under The Doctrine Of Conflict Preemption.

As this Court has noted repeatedly (and the Supremacy Clause of the United States Constitution demands), "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, . . . where there is implicit in federal law a barrier to state regulation, . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (emphasis added).

"[I]n any pre-emption analysis, the purpose of Congress is the ultimate touchstone." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738, 747 (1985) (internal quotation and alteration omitted). In cases involving preemption issues, a court's duty is to "decide if a state rule conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 120, 131-32 (1994) (internal quotation omitted). *See also Hill v. Florida*, 325 U.S. 538, 543 (1945) (finding state licensing provision conflicted with NLRA provision allowing employees to select their own bargaining agents and to pass upon their qualifications).

Moreover, when application of state law would restrict the exercise of rights guaranteed by federal law or undermine the purpose of such law, the conflict is resolved in favor of federal law. *N.Y. Tel. Co. v. N.Y. Dept. of Labor,* 440 U.S. 519, 529 (1979).

In passing Section 203(o), Congress indisputably wanted to let the matter of Clothes-Changing Compensation be "carefully threshed out between the employer and the employee." It wanted to "prevent such a situation" where a CBA could be overridden years later resulting in an employer having to pay back wages for "time which everybody had considered was excluded as a part of the working day." It wanted to give "sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement." Implementing these areas, Congress mandated that Clothes-Changing Time "shall be excluded" from hours worked when a CBA so provides. 29 U.S.C. §203(o).

Now, if the Decision stands, what "everybody had considered to be *excluded* as a part of the working day" instead will be deemed to be *included*. A governmental official *will* be able to override a CBA. The "sanctity" of the CBA will *not* be respected. Clothes-Changing Time will *not* be excluded from hours worked, despite Section 203(o)'s mandate. The direct conflict is manifest.

In this instance, Kraft and the Union "collectively bargained in good faith and agreed" in exchange for other concessions – including a higher hourly wage –

that the minimal time employees spent in changing clothes would be excluded from "hours worked," as expressly authorized by Section §203(o). Respondents' state law claims are preempted because they otherwise deny this express right under federal law, resulting in direct and unlawful state interference with Congress' express purpose in passing Section 203(o).

C. The *Garmon* Doctrine Independently Requires Preemption.

In *Garmon*, this Court established that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [NLRA §7], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. *Garmon* emphasized that *potential* rather than actual, conflict is enough to require preemption. *Id.* at 246. If conduct "is arguably within the compass of §7 or §8 of the [NLRA], the State's jurisdiction is displaced." *Id.*

As this Court later explained in *N.Y. Telephone*, Congress'

> overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress [the National Labor Relations Board] not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in §8 of the Act, as well as state

> interference with the exercise of rights protected by §7 of the Act.

440 U.S. at 528 (internal citations omitted).

Both NLRA Sections 7 and 8 concern collective bargaining between employers and union representatives. *See* 29 U.S.C. §§157, 158. States may not invade this bargaining process. *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (noting that the NLRA does not permit "direct intrusion by the state into the collective bargaining process").

In *Gould*, this Court held that *Garmon* preempted a Wisconsin statute that provided an additional remedy to that authorized by the NLRB. 475 U.S. 282. The Wisconsin statute had proscribed state procurement of products manufactured or sold by repeated violators of the NLRA even though the NLRB authorized no such remedy. Thus, Wisconsin suspended respondent from future state procurement opportunities after its various divisions were named in four NLRB enforcement orders, all outside of Wisconsin. The same District Court judge as here found the Wisconsin law to be preempted, and the Seventh Circuit agreed. The Supreme Court affirmed, stating:

> The *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U.S., at 247. The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated

> federal scheme of law, remedy and administration,' *id.*, at 243, and this Court has recognized that '[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.' *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Id. at 276. Similarly, Wisconsin law here may be viewed as adding a remedy – the inclusion of Clothes-Changing Time as part of a compensable hour – under circumstances where federal law has authorized parties to a CBA to exclude that remedy.

D. The Seventh Circuit's Reasons For Avoiding Preemption Each Fail.

By misapplying Section 203(o) and other FLSA Sections, the Seventh Circuit improperly avoided the preemption issue and – on an issue of first impression – established a precedent that is directly contrary to what Congress intended and public policy requires, showing that Supreme Court Rule 10(c)'s criteria are satisfied here.

1. The Seventh Circuit Misinterpreted Section 203(o)'s Relationship To Other FLSA Sections.

The Seventh Circuit read the reference to FLSA Sections 206 and 207 in the opening clause of Section 203(o) to suggest that Section 203(o) is limited to "rules of federal law." It concluded from this that "[s]tates

are free to set higher hourly wages or shorter periods before overtime pay comes due." (A5).[6] Yet, that freedom does not permit states to override CBA provisions entered into pursuant to Section 203(o). Where a CBA addresses Clothes-Changing Time, Section 203(o) *excludes* this from what states may consider as an hour for purposes of wage or overtime laws.

The Seventh Circuit also based its Decision on Section 218(a), which allows States to set higher hourly wages or shorter periods before overtime pay becomes due. In Section 218(a), Congress specifically authorized states to implement higher minimum wages than federal minimums and to set lower maximum hours worked than federal law set before overtime pay was required. It concluded from this that "[n]othing in Section 203(o) limits the operation of §218(a)," (A5), but this reasoning has it backwards. Section 218 makes no reference to clothes changing nor limits Section 203(o) in any way. The specific statute – here Section 203(o) – controls over the more general provisions of Section 218(a). *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991). As this Court recently reiterated, "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."

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[6] Nothing in Wisconsin law specifically addresses Clothes-Changing Time or expressly requires an employer to compensate for it. The Seventh Circuit just read the absence of any state analogy to Section 203(o) to require this result.

Bloate v. United States, 130 S. Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

If Clothes-Changing Time is carved out from "hours worked" (as it would be elsewhere in the FLSA), Section 218(a) remains viable as a savings clause. States may still set lower hours for overtime but cannot include in these hours the discrete subject areas that federal law has withdrawn. So, for instance, if federal law has a 35-hour minimum overtime requirement, Wisconsin may set a 30-hour requirement. But for purposes of both laws, Clothes-Changing Time must be excluded if a CBA so provides.

A savings clause such as Section 218(a) should not be read so that it undermines the legislative purpose of a substantive statutory provision. This Court has repeatedly "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, 529 U.S. 89, 106 (2000).

Nor will the presence of a savings clause preclude the application of conflict preemption to preempt state law that conflicts with a federal statute. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (District of Columbia tort law that conflicted with federal statute preempted, despite savings clause). Section 218 does not provide a

license for states to override a CBA where a federal regulator may not.

2. The Seventh Circuit's "Multiplier/ Multiplicand" Reasoning Cannot Withstand Scrutiny.

The Seventh Circuit also reasoned, in error, that because unions and employers may not contract around state and local wage minimums in their CBAs, they likewise cannot contract around state requirements as to hour limits. Thus, the Seventh Circuit held "[i]t would be senseless to say that a state may control the multiplicand but not the multiplier, or the reverse, because control of either one permits the state to determine the bottom line (provided that the state's number exceeds the federal minimum . . .)." (A5). But this reasoning fails. The FLSA provided for no carve-out from what constitutes a minimum hourly wage – the "multiplicand," to use the Seventh Circuit's term. Section 203(o) does not address the amount of wages. But Section 203(o) *does* carve out what may be counted as an "hour worked" when a CBA addresses Clothes-Changing Compensation. As noted above, a state may establish a lower minimum number of hours to qualify for overtime than does federal law, but it is still required to exclude Clothes-Changing Time in calculating such hours.

3. The Seventh Circuit's Speed Limit Analogy Fails.

Similarly, the Seventh Circuit analogized that unions and employers may not agree by CBA to flout state speed limits. (A7). This analogy is strained for at least three reasons. First, Congress does not authorize unions and employers to contract around speed limits in their CBAs. Yet Congress *has* authorized unions and employers to contract as to Clothes-Changing Compensation. Second, if Congress wanted to, under the Supremacy Clause, Art. VI, §1, it *could* allow unions and employers to contract around state speed limits. Third, speed limits, of course, represent a legislative judgment of what best promotes the common interest in public safety. Here, as noted above, Congress has determined that it is in workers' and employers' best interests to allow the issue of Clothes-Changing Compensation to be resolved through collective bargaining, and this case demonstrates why that is a prudent and just decision.

The Seventh Circuit cited *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), to suggest that a CBA may be "*ignored*, to the extent that it sets lower wages or hours than state law specifies." (A6) (emphasis in original). Again, Wisconsin is not merely setting lower hours, it is including within its calculation of hours a subject that Congress mandated be excluded in Section 203(o). *Lingle*, is otherwise inapposite. It concerned whether an employee could bring a state retaliatory discharge claim and held that Section 301 did not preempt that claim.

In so deciding, this Court looked at the two elements necessary to establish a *prima facie* retaliatory discharge claim: (1) discharge or a threat thereof; and (2) a motive to deter the employee from exercising her rights. This Court concluded that these elements were purely "factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer" and that "[n]either of the elements requires a court to interpret any term of a collective-bargaining agreement." *Id.* at 407.

E. This Court Should Grant This Petition To Reverse A Dangerous Precedent And Provide Clear Direction On This Vital Issue.

1. If Left To Stand, The Decision Will Nullify The Purpose Of Section 203(o).

The Decision allows state laws and municipal ordinances to interfere with the intended reach of CBAs on an issue that is plainly otherwise governed by federal law. As authorized by Section 203(o), the Union and Kraft agreed in their CBA to forgo Clothes-Changing Compensation in exchange for higher wages.

The Decision below directly conflicts with Congress' general intent to leave the regulation of CBA provisions solely to federal law. Instead, the Decision creates a precedent pursuant to which each of the 50 states, every territory, and every municipality across

the country may override even long-settled collective bargaining determinations regarding Clothes-Changing Compensation.

The Decision also jeopardizes the interests of uniformity and predictability that led Congress to limit state regulation of CBAs. Under the Seventh Circuit's reading, federal agencies – but not states and municipalities – must defer to CBA determinations as to Clothes-Changing Compensation. The result will be an unpredictable, confusing patchwork that will discourage both labor and management from addressing this issue in future CBAs. *See Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by all 50 states in evaluating preemption). If Representative Herter was worried about federal DOL employees interfering with collective bargaining decisions, that fear is magnified thousand-fold by allowing representatives of every state and every municipality in the country to do so. The Seventh Circuit's claim that Wisconsin law as applied here merely "ignores" the CBA rather than "interprets" that CBA is erroneous. (A6).

The Decision cannot be squared with Representative Herter's stated goals for Section 203(o) to promote the sanctity of collective bargaining or letting unions and employers "thresh[ ] out" the best solutions for Clothes-Changing Time for themselves. Once unions and employers fear to bargain as to Clothes-Changing Compensation, Section 203(o) will be a nullity. This Court has noted frequently its refusal to

"nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate," *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (collecting authority), and should act to prevent nullification here.

2. If Left To Stand, The Decision Will Undermine Workers' Confidence In Unions And The Collective Bargaining Process.

If a union cannot deliver on its promises as to Clothes-Changing Compensation, workers may doubt that it can deliver on other promises. Similarly, if a state or municipality may override a CBA provision that has lasted more than 25 years – such as the Clothes-Changing Compensation provision here – workers have no confidence that any term in a CBA is truly settled and enforceable. Far from seeing a CBA as "sanctified," workers will mistrust the collective bargaining process. In *Lucas Flour*, this Court noted that Congress sought to avoid interpreting individual CBA terms to have different meanings for purposes of state and federal law. The Court determined the harm of such inconsistency:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained

> or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Id. at 103-104. Yet, these fears may well be realized if this Court lets the Decision remain precedent.

3. If Left To Stand, The Decision Will Allow States And Municipalities To Improperly Deprive Management And Labor Representatives Of The Benefit Of Their Bargains.

Kraft and its Union reached a bargain more than 25 years ago as to how to best resolve the contentious issue of Clothes-Changing Compensation. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("[c]ontracts enable individuals [and organizations] to order their personal and business affairs according to their particular needs and interests"). Now, however, the Decision allows states and

municipalities to essentially rewrite that CBA, requiring Kraft to still pay its workers the higher wages it promised in exchange for their concession to forgo Clothes-Changing Compensation, but depriving Kraft of the benefit of that concession. If the Decision stands, therefore, workers will receive an unfair windfall.

4. If Left To Stand, The Decision Will Open The Floodgates To Litigation That Congress Meant To Close.

As noted above, Congress passed Section 203(o) to close a loophole in the PPA that led to a torrent of litigation over Clothes-Changing Time. Now, there likely will be a new flood of litigation raising the issue of whether a state or local law in fact applies to a particular Clothes-Changing Compensation provision.

5. If Left To Stand, The Decision Will Undermine The Portal-To-Portal Act.

As *Sepulveda* notes, Section 203(o) rests on the same principle as the PPA itself – to allow certain activities to be defined as outside the scope of hours worked under certain circumstances for purposes of compensation. Thus, if one follows the Decision to its logical endpoint, it places equally at risk the uniformity and predictability sought by Congress through the PPA. The PPA requires that only principal activities that are compulsory be compensated and that workers should not receive compensation

for pre- or post-liminary activities. 29 U.S.C. §254(a)(2). But under the Decision's logic, nothing would prevent a local law from defining an "hour worked" so that it encompasses activities that are pre- or post-liminary. For example, the Decision appears to leave no recourse to employers or unions if a state or municipality decides to compensate workers for time spent driving from home to work or from work to home, even though this is traditionally deemed to be pre- or post-liminary. After all, this could be viewed an easier path to overtime than federal law provides.

To provide clarity and direction on this vital issue, pursuant to Supreme Court Rule 10(c), this Court should grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the United States Court of Appeals
For the Seventh Circuit

No. 09-2691

JEFF SPOERLE, *et al.*,

Plaintiffs-Appellees,

v.

KRAFT FOODS GLOBAL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 07-cv-300-bbc – **Barbara B. Crabb**, *Judge.*

ARGUED DECEMBER 3, 2009 –
DECIDED AUGUST 2, 2010

Before EASTERBROOK, *Chief Judge,* and MANION and EVANS, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* The Fair Labor Standards Act requires employers to pay workers for time spent donning and doffing "integral and indispensable" safety gear. *See IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); 29 U.S.C. §254. It aiso allows labor and management to vary this rule through collective bargaining:

> Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. §203(*o*). This appeal presents the question whether §203(*o*) preempts state law that lacks an equivalent exception.

Kraft Foods requires the employees who prepare meat products at its Oscar Mayer plant in Madison, Wisconsin, to wear safety gear, such as steel-toed boots and hard hats, plus a smock that keeps other garments clean. Workers must wear hair nets and beard nets to protect the food from dandruff and other contaminants. It takes each worker a few minutes at the start of every day to put these items on, and a few more at day's end to take them off. Kraft Foods and Local 538 of the United Food and Commercial Workers Union have agreed that this time is not compensable. Section 203(*o*) permits unions and management to trade off the number of compensable hours against the wage rate; the workers get more, per hour, in exchange for agreeing to exclude some time from the base.

The plaintiffs in this suit disagree with the tradeoff struck in the collective bargaining agreement and want the time included – and at the higher hourly rate that the union obtained by agreeing to exclude these few minutes a day. They have two principal arguments: first that protective gear is not "clothing" under §203(*o*), and second that Wisconsin's own wage-and-hour legislation lacks any equivalent to §203(*o*). The first of these arguments is a loser, for reasons given in *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009). We agree with *Sepulveda* and need not repeat its analysis. But the second prevailed in the district court. The Fair Labor Standards Act has a saving clause:

> No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter. . . . No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

29 U.S.C. §218(a). This means, the district court concluded, that donning and doffing time counts toward the workweek (and overtime rates) if state

law so provides. Kraft Foods concedes that Wisconsin requires time spent donning and doffing safety gear to be compensated at the minimum wage or higher, and that this time counts toward the limit after which the overtime rate kicks in. See Wis. Stat. §§ 109.03, 103.02; Wis. Admin. Code § DWD 272.12(2)(e). (This makes it unnecessary to decide whether federal law would require payment for this time, in the absence of a §203(*o*) agreement. See *Pirant v. United States Postal Service*, 542 F.3d 202, 208-09 (7th Cir. 2008) (discussing which kinds of required safety gear are "integral and indispensable" for purposes of the analysis in *IBP*).) Kraft Foods contends, however, that §203(*o*) preempts Wisconsin's law. The district judge rejected that argument and entered judgment in plaintiffs' favor as a matter of Wisconsin rather than federal law, see 626 F. Supp. 2d 913 (W.D. Wis. 2009), a step supported by the supplemental jurisdiction of 28 U.S.C. §1367.

Kraft Foods contends that §203(*o*) embodies a federal decision to permit a collectively bargained resolution to supersede the rules otherwise applicable to determining the number of hours worked. That's an accurate statement, as far as it goes. But "as far as it goes" means "as far as §203(*o*) itself goes." And the statute tells us exactly how far it goes. The first words of §203(*o*) are: "In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed . . . ". Section 206 sets the federal minimum wage per hour worked. Section 207 specifies how many hours a person may work in a

given period before overtime pay commences. These are rules of federal law. States are free to set higher hourly wages or shorter periods before overtime pay comes due. That's what §218(a) says. Nothing in §203(*o*) limits the operation of §218(a).

As far as we can tell, this is the first time an employer's argument that §203(*o*) preempts state law has reached a court of appeals. All three district judges who have considered this argument have rejected it. In addition to the decision under review, see *In re Cargill Meat Solutions Wage & Hour Litigation*, 632 F. Supp. 2d 368, 392-94 (M.D. Pa. 2008); *Chavez v. IBP, Inc.*, 2005 U.S. Dist. LEXIS 29714 at *112-22 (E.D. Wash. May 16, 2005). If Wisconsin had provided for a minimum hourly wage exceeding the rate in the collective bargaining agreement between Kraft Foods and Local 538, the state law would trump the CBA. And if this is so for the hourly rate, it must be equally so for the number of hours, because how much pay a worker receives depends on the number of hours multiplied by the hourly rate. It would be senseless to say that a state may control the multiplicand but not the multiplier, or the reverse, because control of either one permits the state to determine the bottom line (provided that the state's number exceeds the federal minimum; §218(a) does not allow a state to authorize employers to pay less than the federal floor).

As Kraft Foods sees things, Wisconsin is meddling with collective bargaining, so that federal labor law preempts state law if §203(*o*) does not do the

trick. Yet nothing in the Wisconsin statutes gives a state court, or other state official, any role in interpreting or enforcing a collective bargaining agreement. What Wisconsin requires is that the collective bargaining agreement be *ignored*, to the extent that it sets lower wages or hours than state law specifies. Cf. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state rules that disregard, rather than interpret, collective bargaining agreements are not preempted by federal labor policy). Suppose the CBA set a wage of $8 per hour, higher than the current federal minimum wage of $7.25, while Wisconsin law set a minimum wage of $8.25. (Wisconsin's actual minimum wage is $7.25, but some states, including Illinois, use $8.25.) No one would contend that the employer could pay the workers $7.25 an hour, even though that is allowed by federal law if labor and management agree (this is the same sense that excluding donning and doffing time is allowed by §203(*o*)). Which rate would prevail: $8 from the CBA or $8.25 from state law? According to §218(a), the employer must pay $8.25 an hour; state law supersedes the collective bargaining agreement. And if this is so about the wage per hour, it is equally true about the number of hours.

Nothing that labor and management put in a collective bargaining agreement exempts them from state laws of general application. If a CBA were to say: "the workers will receive the minimum wage under FLSA, and not one cent more no matter what state law provides," that would be ineffectual. So too

would an agreement along the lines of: "Because our base hourly rate is more than 150% of the minimum wage, we need not pay overtime rates under state law." States can set substantive rules that determine the effective net wage, even when a CBA plays a role (as it does when a law requires overtime pay at some multiple of the base pay set in a collective bargaining agreement). Every state's overtime-compensation rule could *affect* collective bargaining – knowing that state law requires pay at time-and-a-half, labor and management might agree to a lower base rate per hour – but that effect would not prevent application of the state's wage-and-hour statutes.

Management and labor acting jointly (through a CBA) have no more power to override state substantive law than they have when acting individually. Imagine a CBA saying: "Our drivers can travel at 85 mph, without regard to posted speed limits, so that they can deliver our goods in fewer compensable hours of work time." That clause would be ineffectual. And a CBA reading instead that "our drivers can travel at a reasonable rate of speed, no matter what state law provides" would be equally pointless. Making a given CBA hard to interpret and apply (as the word "reasonable" would be) would not preempt state law on the theory that states must leave the interpretation of CBAs to the National Labor Relations Board and the federal judiciary; states would remain free to enforce laws that disregarded CBAs altogether. That is what Wisconsin does when determining which donning and doffing time is compensable.

The district court therefore did not err in concluding that plaintiffs are entitled to be paid for all time required by Wisconsin law, and the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDTSON, on behalf of themselves and all others who consent to become Plaintiffs and similarly situated employees,

Plaintiffs,

v.

KRAFT FOODS GLOBAL, INC., Oscar Mayer Foods Division,

Defendant.

OPINION and ORDER

07-cv-300-bbc

(Filed Jun. 17, 2009)

Plaintiffs Jeff Spoerle, Nick Lee, Kathi Smith and Jason Knudtson brought this combined collective action under the federal Fair Labor Standards Act and class action under state law, contending that hourly employees at the Oscar Mayer plant in Madison, Wisconsin should be paid for the time spent donning and doffing a number of safety and sanitation articles and walking to and from their work stations at the beginning and end of their shifts. In its original motion for summary judgment, defendant Kraft Foods Global, Inc. argued that federal law does not require compensation because these activities fall within several exceptions to the FLSA definition of "work" involving "preliminary" and "postliminary"

activities, "changing clothes" and "de minimis" acts. In addition, it argued that any Wisconsin laws requiring payment were preempted under several different theories. In an order dated December 31, 2007, I denied defendant's motion because it failed to show as a matter of law that any of the exceptions applied or that federal law preempted state law. *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860 (W.D. Wis. 2007).

Just before the trial was scheduled to begin in July 2008, the parties came to a "settlement" of sorts. Under their agreement, plaintiffs limited the scope of their claims to seeking compensation for time spent the last two years walking between the locker room and work stations and donning and doffing the following items: captive footwear (boots or shoe rubbers), head gear (hard hats or bump caps), hairnets, beard nets and frocks or career clothing. For its part, defendant withdrew all but two of its defenses: (1) donning and doffing the items at issue falls within the "changing clothes" exception to compensable work under 29 U.S.C. § 203(*o*); and (2) plaintiffs' state law claims are preempted by federal law. The parties submitted a stipulation of facts and agreed to a formula for calculating damages in the event that plaintiffs prevailed on liability. Dkt. ## 242, 274.

Now before the court are the parties' cross motions for summary judgment, as anticipated by the agreement. Although *Pirant v. United States Postal Service*, 542 F.3d 202, 208-09 (7th Cir. 2008), muddies the waters somewhat with respect to the scope of

plaintiffs' rights under the FLSA, I conclude that § 203(*o*) does not preempt more generous state laws even if the articles at issue in this case are "clothes" within the meaning of § 203(*o*). Because the parties agree that state law *does* require defendant to pay plaintiffs for donning and doffing these articles and that plaintiffs are entitled to full relief under the settlement if they are successful on their federal law claims *or* their state law claims, it is unnecessary to determine whether plaintiffs are entitled to prevail under the FLSA. Judgment will be entered in favor of plaintiffs.

The following facts are taken from the parties' joint stipulation of facts. Dkt. #240.

UNDISPUTED FACTS

Defendant Kraft Foods Global, Inc. operates a meat processing plant in Madison, Wisconsin through its Oscar Mayer Foods division. Plaintiffs are current or former employees at the Madison plant. (782 employees have filed consents to join the suit under the FLSA; three members of the class have opted out of the state law claims.)

Federal law and defendant's policies require employees to don a number of articles for purposes of safety and sanitation. Defendant requires plaintiffs to don and doff some of these articles without being paid for doing so, that is, before the beginning of their shift and after the end of their shift. These articles include: captive footwear (shoe rubbers, over-the-calf rubber

boots, or work boots), hairnets, beard nets (if an employee has a beard), hard hats or bump caps, frocks or career clothing (shirt, pants and jacket). The footwear and career clothing generally are worn in place of plaintiffs' own clothes; the frocks are worn over those clothes.

Plaintiffs are not permitted to remove any of the articles from the plant. The articles are stored in or near the locker room. Plaintiffs may don the articles there or on their way to the production area, where the time clock is. The process is reversed at the end of the shift; after plaintiffs clock out, they may remove the articles and return them to the area they are stored. Depending on each plaintiff's department, it takes between five and twelve minutes to don and doff these articles and walk to and from the locker room and production area.

Since 1985, defendant has not paid its employees for donning and doffing these articles, pursuant to the collective bargaining agreement between defendant and plaintiffs' union.

OPINION

The focus of the parties' remaining disputes is the proper scope of 29 U.S.C. § 203(*o*):

> Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning

> or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

As now constituted, the case raises two questions: (1) are the articles that plaintiffs are required to don and doff exempt from the requirements of the FLSA because they are "clothes" within the meaning of 29 U.S.C. § 203(*o*); and (2) if they are exempt, does § 203(*o*) preempt Wisconsin law that does not contain an exception for "changing clothes"? (I do not address the issue that some courts have, *e.g.*, *Figas v. Horsehead Corp.*, 2008 WL 4170043, *6 (W.D. Pa. Sept. 3, 2008), which is whether the donning and doffing of the articles qualifies as "changing" within the meaning of § 203(*o*), because the parties do not raise it.)

With respect to the question under § 203(*o*), in the December 31, 2007 order, I rejected the "I know it when I see it" approach to defining the term "clothes" advanced by defendant. In the cases defendant relied on at summary judgment, courts had concluded that certain articles used for safety and sanitation were "clothes" without explaining why or providing a definition of the term. *E.g.*, *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955-56 (11th Cir. 2007); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n. 3 (5th Cir. 2001); *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1067 (D. Minn. 2007). Instead, I followed the lead of the court in *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL

32987224, *11 (N.D. Ala. Feb.4, 2002), in which the court had noted that "changing clothes" is "an everyday, plain-language term that describes what most people do every day – taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening." Under "[t]his view, the relevant questions [are] straight forward: Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason?" *Spoerle*, 527 F. Supp. 2d at 867. *See also Hoyt v. Ellsworth Co-op. Creamery*, 579 F. Supp. 2d 1132, 1137 (W.D. Wis. 2008) (Shabaz, J.) (adopting same definition); *Perez v. Mountaire Farms, Inc.*, No. CIV. AMD 06-121, 2008 WL 2389798, *3 (D. Md. June 10, 2008) (same). Because the parties had adduced little evidence regarding the nature and purpose of the articles at issue, I concluded that defendant had failed to show as a matter of law that the articles met this standard.

Without saying so explicitly, defendant is seeking reconsideration of the summary judgment order by asking for a new interpretation of § 203(*o*). In particular, defendant argues that the meaning of "changing clothes" should be governed by the collective bargaining agreement so long as that agreement is "bona fide." Not surprisingly, defendant believes that the standard is met in this case and that the court should give "deference" to the collective bargaining

agreement, which does not require compensation for donning and doffing the articles in dispute.

Defendant's position has some surface appeal. From the courts' perspective, it could eliminate the task of construing an ambiguous statutory term. From the employers' and employees' perspectives, it could provide greater certainty over the scope of their respective rights and obligations because one need only consult the collective bargaining agreement to determine whether donning and doffing particular items is a compensable activity.

A closer view of defendant's proposal reveals serious flaws. For one thing, it collapses a two-part question under the statute into a single inquiry. Under § 203(*o*), donning and doffing particular articles may be excluded from an employee's "hours worked" if two conditions are met: (1) the activity is excluded from compensation "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement"; *and* (2) the activity constitutes "changing clothes." *Figas,* 2008 WL 4170043, at *6 ("Inherent in this defense [under § 203(*o*)] are two separate elements"). Under defendant's view, once it is determined that the act of donning and doffing particular articles is not protected by the collective bargaining agreement, the analysis is complete. In other words, if the collective bargaining agreement does not require compensation for donning and doffing, it necessarily means that the articles are "clothes" within the meaning of § 203(*o*).

The problem with this view is that Congress gave no hint in the statute that the task of interpreting § 203(*o*) should be relegated to employers or unions. Ordinarily, questions of statutory construction are the province of the judiciary. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 544 (1940) ("The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."). Defendant fails to point to even one other example in which private parties have binding authority to construe a statute, or, as defendant suggests even more boldly, in which the meaning of a word in a statute can *vary* from case to case, depending on the individualized interpretation in a collective bargaining agreement. By their nature, statutes are meant to create rules of conduct that govern everyone the same. I would not depart from this basic principle of law without strong evidence of congressional intent, evidence that defendant has failed to provide.

Perhaps realizing the problems its approach poses, defendant puts a qualifier on it, saying that courts may provide their own definition when the one in the collective bargaining agreement is "patently unreasonable" or otherwise unfair. Dft.'s Br., at 2, dkt. #277. This qualifier seems to be an attempt by defendant to align itself with those courts that have distinguished "specialized protective gear" from "non-unique protective gear," concluding that the latter qualifies as "clothes" under § 203(*o*) but the former does not. *E.g., Anderson,* 488 F.3d at 955-56; *Alvarez v. IPB, Inc.,* 339 F.3d 894 (9th Cir. 2003); *Kassa,* 487

F. Supp. 2d at 1067. Defendant says that the approach in these cases is consistent with its own because items that are "extensive, unique and burdensome to don and doff . . . are far less likely to fit into any good faith, shared definition of 'clothes.'" Dft.'s Br. at 21, dkt. #277.

Once defendant qualifies its position in this way, any practical benefits it might have disappear. Defendant argues that a problem with this court's interpretation of § 203(*o*) is that it "leaves so many open questions only resolvable on a case-by-case basis." Dft.'s Br., at 17, dkt. #277. To the extent this is true, defendant's approach does not solve that problem. Instead of arguing over whether an article is something an employee would wear anyway, parties employing defendant's proposed standard would argue over whether articles are sufficiently "extensive, unique and burdensome," which are far from self defining terms. Thus, adopting defendant's view would not eliminate the need for the difficult line drawing that defendant criticizes; it would simply move the line in a direction that favors the employer. More important, the distinction defendant would make between "burdensome" or "unique" articles and any other safety or sanitation equipment has no basis in the statute or in the ordinary meaning of clothes. Thus, defendant's view would return courts to the "I know it when I see it" approach I rejected in the summary judgment order.

Although I do not find defendant's view of § 203(*o*) persuasive, I agree that the law in this

circuit is not the blank slate it was at the time of the summary judgment order. In *Pirant v. United States Postal Service,* 542 F.3d 202, 208-09 (7th Cir. 2008), the court considered whether, under the Family Medical Leave Act, the time spent by a postal service employee donning and doffing "gloves, shoes and [a] work shirt" was work time that could be counted toward qualifying under the Act. After noting that the FMLA is governed by the same standards as the FLSA, the court cited *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956), for the proposition that "changing clothes" is a noncompensable "preliminary" or "postliminary" act under 29 U.S.C. § 254(a) of the FLSA unless "those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." Finally, the court concluded that the plaintiff's donning and doffing was not compensable because she "was not required to wear extensive and unique protective equipment." *Pirant,* 542 F.3d at 209.

I agree with plaintiffs that *Pirant* is distinguishable from this case in a number of ways. Most notable, the court was not applying § 203(*o*), but rather the FLSA exception under § 254(a) regarding "preliminary" and "postliminary" activities, which is no longer at issue in this case. (Originally, defendant raised a defense under § 254(a), but withdrew it as part of the settlement.) In addition, the articles at issue in this case are different from the articles in *Pirant,* which were simply a uniform and thus would fall under any definition of "clothes." *Spoerle,* 527

F. Supp. 2d at 867 ("Under this [court's] understanding of 'changing clothes,' putting on a uniform would not be covered under the FLSA under ordinary circumstances, but donning and doffing equipment used to protect against hazards particular to the workplace would be covered.")

Although *Pirant* is not on all fours with this case, it cannot be set aside as easily as plaintiffs suggest. The analysis under § 254(a) is closely related to the one under § 203(*o*) in the context of donning and doffing, particularly in light of this court's summary judgment order. Both require a court to examine the nature and purpose of the article. If an article is not "integral and indispensable" under *Steiner* for safety or other job-related reasons, this makes it more difficult to argue that the article is protective equipment rather than clothes under § 203(*o*). *E.g., Figas,* 2008 WL 4170043, at *18 (discussing interaction of § 203(*o*) and § 254(a)). Further, even though the articles at issue in *Pirant* were different from those in this case, the standard suggested by the court goes beyond the particular facts of the case. In concluding that the donning and doffing was not compensable, the court noted that the articles were not "extensive and unique protective equipment." *Pirant,* 542 F.3d at 209. Although the court did not cite any cases for this approach, it is evocative of the approach I rejected from cases like *Anderson* and *Kassa.* If that standard were applied to the articles in this case, it is unlikely that plaintiffs could meet it.

Pirant is not the only potential problem for plaintiffs. In the summary judgment order, I rejected defendant's argument under § 203(*o*) in part because defendant had proposed so few facts about the articles that it was impossible to tell whether or not they were "clothes" under this court's interpretation of that term. Now, however, the facts show that some of the articles at issue are worn as replacements for clothes that plaintiffs would wear anyway, which is a key part of this court's definition.

Although *Pirant* may leave the state of federal law in this circuit unclear and the facts in this case may cast some doubt on plaintiffs' ability to meet the standard under § 203(*o*) set forth in the summary judgment order, I need not resolve these questions. The parties agree that plaintiffs are entitled to full relief under the terms of the settlement if they succeed on their federal law claims under the FLSA *or* their state law claims under Wis. Stat. §§ 109.03 and 103.02. Under their settlement, the parties agree that Wisconsin law requires compensation for donning and doffing the items at issue because it does not include a counterpart to § 203(*o*). Defendant raises no defenses related to the scope of state law. The only defense it raises is that the state laws are unenforceable because they are preempted by federal law. Thus, unless defendant is right about preemption, plaintiffs win. Because I conclude that defendant is wrong on this issue, I will enter judgment in favor of plaintiffs.

Defendant's theory of preemption is that § 203(*o*) conflicts with any claims under state law that would

require it to compensate plaintiffs for donning and doffing the articles at issue in this case. (I will assume for the purpose of considering defendant's preemption arguments that the articles are "clothes" within the meaning of § 203(*o*).) Under a theory of conflict preemption like the one defendant asserts, the standard is a relatively general one, which is "whether state law differs from federal law in such a way that achievement of the congressional objective is frustrated." *Aux Sable Liquid Products v. Murphy,* 526 F.3d 1028, 1034 (7th Cir. 2008) (internal quotations and alterations omitted).

Defendant identifies three other types of preemption under § 301 of the Labor Relations Management Act and under the theories set forth in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and *Lodge 76, International Associationn of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), but it does not develop any argument with respect to these theories. Although defendant says it does not intend to waive those arguments, that is exactly what it has done by failing to develop them. *E.g., General Auto Service Station v. City of Chicago,* 526 F.3d 991, 1006 (7th Cir. 2008); *Pruitt v. City of Chicago, Illinois,* 472 F.3d 925, 930 (7th Cir. 2006).

In attempting to show that § 203(*o*) preempts more generous state laws, defendant faces an uphill battle. Any preemption analysis begins with two basic principles: the intent of Congress always controls and the presumption is that Congress does not wish to

interfere with the state's power to provide for the welfare of its people. *Wyeth v. Levine,* 129 S. Ct. 1187, 1194-95 (2009). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States," *Altria Group, Inc. v. Good,* 129 S. Ct. 538, 543 (2008), such as labor law. *Anderson v. Sara Lee Corp.,* 508 F.3d 181, 193 (4th Cir. 2007) ("There is a strong presumption that Congress, in enacting the FLSA for the benefit of workers, did not intend to override the States' traditional role in protecting the health and safety of their citizens."). A party arguing that federal law preempts a state law must show that was "the clear and manifest purpose of Congress." *Wyeth,* 129 S. Ct. at 1195.

Defendant's burden becomes even heavier when one considers that the general purpose of the FLSA is to prevent "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Defendant could not argue successfully that such a purpose is frustrated by a statute that seeks to insure full compensation to employees for all of the work that they do.

Perhaps defendant's biggest obstacle is the express savings clause that Congress included in the FLSA. Under 29 U.S.C. § 218(a), "No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum

work week lower than the maximum workweek established under this chapter."

Defendant attempts to avoid the effect of § 218(a) with a single sentence in its opening brief in which it states that "[t]he right to remove compensation for clothes changing from the collective bargaining table is noticeably absent from this clause." Dft.'s Br., at 33, dkt. #277. This is reading § 218(a) and § 203(*o*) too narrowly. The question under § 218(a) is not whether a particular activity is expressly enumerated under the statute, but whether the state law can be described as setting a higher minimum wage or lower maximum work week than federal law.

The state law provisions at issue in this case, Wis. Stat. §§ 103.02 and 109.03 (and the implementing regulations in Wis. Admin. Code Chs. 272 and 274), are wage and hour laws. Section 103.02 governs the maximum number of hours employees may be required to work without being paid overtime; section 109.03 governs the payment of wages. Section 203(*o*) is simply a method for calculating "hours worked" in the context of §§ 206 and 207 of the FLSA, which are the federal analogs to §§ 103.02 and 109.03. *Mueller v. Thompson,* 133 F.3d 1063, 1064 (7th Cir. 1998) (noting substantial overlap between FLSA and Wis. Stat. §§ 109.03 and 103.02). In particular, section 203(*o*) defines "[h]ours [w]orked . . . for the purposes of sections 206 and 207" so that "time spent in changing clothes" is "excluded" from the calculation if that issue has been addressed by a collective bargaining agreement. Thus, § 203(*o*) sets a higher "maximum

work week" than Wisconsin law under some circumstances because it excludes certain activities from the calculation that would otherwise qualify as "work" under both state and federal law, namely, changing clothes. *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 589 F. Supp. 2d 1026, 1031 (E.D. Wis. 2008) ("[T]he FLSA would preempt only state laws that mandated lower minimum wages or longer maximum workweeks. Since the parties agree that the Wisconsin wage and hour laws, Wis. Stat. chs. 103 and 104 and §§ 109.01-109.11, are not less generous than those of the FLSA, it seems clear that the FLSA does not displace the state law.")

Despite the savings clause, defendant argues that § 203(*o*) is different from other "minimum" and "maximum" laws because § 203(*o*) says that time spent changing clothes "shall be excluded" from the hours worked. According to defendant, unless Wisconsin law is preempted, the standard becomes "shall be *included*," a difference that creates "a direct conflict between federal and state law." Dkt. #277, at 31.

At first look, defendant's argument seems perfectly logical. After all, "include" is the opposite of "exclude," so it would seem that any statute that requires one must conflict with a statute that requires the other. Upon closer inspection, however, the flaws in defendant's logic are revealed. To begin with, Wisconsin law does *not* require employers to pay wages for "changing clothes" in all instances, only when doing so constitutes "work." *E.g.*, Wis. Admin. Code §§ DWD 272.12 and 274.03. Thus, the "shall be

excluded" versus "shall be included" dichotomy defendant attempts to create is misleading.

Further, the same "conflict" could be identified with respect to almost any state law that provides more generous benefits to employees. For example, one could read the federal minimum wage law as saying that "employers *shall not* be required by law to pay employees more than $6.55 an hour," 29 U.S.C. § 206(a)(1), and the Wisconsin law as saying "employers *are* required by law to pay employees more than $6.55 an hour." Wis. Admin. Code § DWD 272.03. Any difference between state and federal law may be characterized as a conflict.

All the difference between federal and state law shows is that Wisconsin law gives workers more rights than they would be entitled to under federal law, something that is permissible as a general matter. *English v. General Electric Co.*, 496 U.S. 72, 89 (1990) ("[O]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.") Defendant says that doing so is impermissible in this case because the intent of Congress in enacting § 203(*o*) was to "give sanctity" to collective bargaining agreements. Dkt. #277, at 29 (quoting statement of Rep. Herter in 95 Cong. Rec. 210 (1949)). This argument has been considered by at least two district courts, both of which rejected it. In *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. Lexis 29714 (E.D. Wash. May 16, 2005), and *In re Cargill Meat Solutions*, No. 3:CV-06-413, 2008 U.S. Dist. LEXIS 31824 (M.D. Pa.

Apr. 10, 2008), the courts reviewed the legislative history behind § 203(*o*) and concluded that it did not support a finding of preemption. Rather, the history showed that Congress was interested in limiting the requirements of federal law; there was no evidence to suggest that it was seeking to override § 218(a). *Cargill,* 2008 U.S. Dist. Lexis 31824, at *72-74; *Chavez,* 2005 U.S. Dist. Lexis 29714, at *118-20. Defendant cites no cases in which a court has come to a contrary conclusion.

The federal bias toward collective bargaining may lead to the preemption of some state laws or causes of action, but generally this has been when state laws create a risk of *taking away* employee rights provided by collective bargaining or becoming entangled in the collective bargaining process, not when state laws *add* a right that is independent from the agreement. *Livadas v. Bradshaw,* 512 U.S. 107, 118 (1994) (preemption appropriate when law imposes "penalty on those who complete the collective-bargaining process" or "those who participate in the process"); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985) (state law cause of action preempted when it would require interpretation of collective bargaining agreement). In *Livadas,* 512 U.S. at 130, the Court could not have stated it more clearly: "[W]e have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course." *See also Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 409-10

(1988) (no preemption when adjudication of "substantive rights a State may provide to workers . . . does not depend upon the interpretation of [collective bargaining] agreements"); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 569 (7th Cir. 1989) ("[F]ederal labor policy does not prevent states from providing workers with substantive rights independent of the collective bargaining relationship.") Defendant fails to cite even a single example in which a court found a state law preempted because it provided more rights than would otherwise be provided in a collective bargaining agreement.

Defendant includes a short discussion in its opening brief regarding "field preemption," but it is nothing more than a restatement of its position that § 203(*o*) conflicts with more generous state laws. Accordingly, it is unnecessary to consider that argument separately.

ORDER

IT IS ORDERED that the motion for summary judgment filed by plaintiffs Jeff Spoerle, Nick Lee, Kathi Smith, and Jason Knudtson, dkt. #279, is GRANTED, and defendant Kraft Foods Global, Inc.'s motion for final judgment, dkt. #276, is DENIED. The clerk of court is directed to enter judgment in favor of plaintiffs. The parties shall determine damages in accordance with the settlement agreement.

Entered this 16th day of June, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

527 F.Supp.2d 860

United States District Court,
W.D. Wisconsin.
Jeff SPOERLE, Nick Lee, Kathi Smith,
Jason Knudtson, on behalf of themselves and
all others who consent to become Plaintiffs
and similarly situated employees, Plaintiffs,
v.
KRAFT FOODS GLOBAL, INC.,
Oscar Mayer Foods Division, Defendant.

No. 3:07-cv-00300-bbc.

Dec. 31, 2007.

Kurt C. Kobelt, Lawton & Cates, S.C., Madison, WI, for Plaintiffs.

Daniel A. Kaplan, Foley & Lardner, Madison, WI, for Defendant.

OPINION AND ORDER

BARBARA B. CRABB, District Judge.

This case presents a straightforward question: does the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, require defendant Kraft Foods Global, Inc., to pay its employees for time they spend putting on and taking off items of safety and sanitation equipment that defendant's policies and federal law require the employees to wear?

Plaintiffs contend that they are entitled to compensation because donning and doffing the equipment constitutes "work" under the FLSA. Although

defendant does not dispute plaintiffs' basic characterization, it argues that the work is not compensable under several of the statute's exceptions involving "preliminary" and "postliminary" activities, "changing clothes" and "de minimis" acts.

In addition to their claim under the FLSA, plaintiffs assert state law wage and hour claims under Wis. Stat. §§ 109.03 and 103.02, as well as a claim for violations of Wis. Admin. Code §§ DWD 272.10 and 274.06, which impose requirements for employer record keeping. Defendant contends that plaintiffs' state law claims are barred under several theories of preemption and that Wisconsin law does not recognize a private right of action for plaintiffs' record keeping claim.

Plaintiffs filed this suit as a purported class action but they have not yet moved for class certification. They have stipulated with defendant to refrain from seeking class certification until the court resolves the defendant's motion for summary judgment. Having reviewed the parties' submissions, I conclude that defendant's motion for summary judgment must be denied in most respects. On the current record, I cannot conclude as a matter of law that the donning and doffing of the equipment at issue in this case is excluded from the protections of the FLSA. With respect to plaintiffs' state law claims, none of defendant's preemption arguments is persuasive. However, because plaintiffs have failed to show that they have a right to sue for enforcement of the record keeping

requirements, I will grant defendant's motion for summary judgment with respect to that claim.

From the parties' proposed findings of fact and the record, I find the following facts to be undisputed.

UNDISPUTED FACTS

Defendant Kraft Foods Global, Inc. operates a meat processing plant in Madison, Wisconsin through its Oscar Mayer Foods Division. Plaintiffs Jeff Spoerle, Nick Lee, Kathi Smith and Jason Knudtson are employees at the plant.

Defendant tracks its employees' hours of work using time clocks, which are located throughout the plant, typically right outside the "production area." Using a credit card-like badge, employees clock in just before entering the production area and clock out for meals and at the end of their shift when they leave the production area.

Under federal law and company policy, employees who work in the production area must wear various items of "personal protective equipment." This equipment includes a hard hat or bump cap, steel-toed shoes or sanitation boots, ear plugs, hairnet and beard net, safety glasses, a freezer coat (if necessary), gloves, plastic gloves, paper frock or plastic apron, sleeves, slickers (for employees that work in wet areas) or a cotton frock (employees may choose to wear cotton pants and a shirt instead, which the

parties refer to as "career clothes"). Employees may be disciplined for failing to wear this equipment.

Employees must put on some of these items before clocking in. Employees retrieve and put on cotton frocks or career clothes and steel-toed shoes or sanitation boots in a locker room at the plant. On their way to clocking in, employees put on ear plugs, hairnets and beard nets, which are kept in bins near the locker room. (The parties do not identify where employees put on hard hats, bump caps, safety glasses and freezer coats, but they agree that employees must put on these items before clocking in.) All of these items are owned by defendant and stored at the plant. After walking to the time clock and swiping their time cards, employees put on plastic gloves, aprons and slickers. (Neither side proposes any facts regarding what happens at the end of the shift, but it is reasonable to infer that it is the same as the beginning of the shift, that is, employees are paid for taking off gloves, aprons and slickers, but not for doffing the other items or for walking back to the locker room.)

The current collective bargaining agreement between plaintiffs and defendant does not guarantee compensation for the time spent donning and doffing personal protective equipment.

OPINION

A. *Fair Labor Standards Act*

Although the Fair Labor Standards Act includes many different provisions, its core requirement can be reduced to a simple and now uncontroversial proposition: employers must pay their employees a wage for all of the "work" that they do. 29 U.S.C. §§ 206 and 207; *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1285 (10th Cir.2006); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir.2003). There are two related exceptions to this rule that are relevant to this case. Work may not be compensable under the FLSA if it (1) is "preliminary to or postliminary to" the employee's "principal" activities and if it occurs "prior to" or "subsequent to" the "workday," 29 U.S.C. § 254(a)(2); or (2) consists of "changing clothes," 29 U.S.C. § 203(*o*). A third non-statutory exception has been carved out by the courts, which is whether a particular activity is "de minimis."

The FLSA does not define "work," but the Supreme Court has construed it broadly. One commonly cited definition comes from *Tennessee Coal, Iron & Rail Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944): "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." But even this view may sound more restrictive than it actually is. The reference to "physical or mental exertion" does not mean that only heavy

labor and solving equations are covered. The Court has placed much greater emphasis on "[w]hether time is spent predominantly for the employer's benefit or for the employee's," *Armour & Co. v. Wantock*, 323 U.S. 126, 133-34, 65 S.Ct. 165, 89 L.Ed. 118 (1944), on the ground that "[n]othing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive." *Tennessee Coal, Iron & Rail Co.*, 321 U.S. at 599, 64 S.Ct. 698; *see also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691, 66 S.Ct. 1187, 90 L.Ed. 1515(1946) (concluding that nonproductive activity was "work" because it "was under the complete control of the employer"). Thus, the Court has concluded that "work" encompasses activities such as traveling on a railcar through a mine shaft, watching and guarding a building, *Tennessee Coal, Iron & Rail Co.*, 321 U.S. at 599, 64 S.Ct. 698, and even standing and waiting, *Armour & Co.*, 323 U.S. at 133-34, 65 S.Ct. 165.

Defendant does not refute plaintiffs' assertion that donning and doffing the personal protective equipment is "work" under the Supreme Court's definition. Rather, it argues that plaintiffs' conduct falls within the exceptions listed above. I will consider each of those in turn.

1. *Preliminary and postliminary activities*

Under the Portal-to-Portal Act, certain activities are withdrawn from the pay mandates of the FLSA,

including "activities which are preliminary to or postliminary to [a] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). Defendant believes that the donning and doffing of protective equipment constitutes noncompensable "preliminary" and "postliminary" activities.

Defendant's view might be plausible looking at the language of the statute in isolation, but it is completely untenable in light of the Supreme Court's interpretations of the statute. The question in *Steiner v. Mitchell,* 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267 (1956), was whether chemical plant employees were engaging in "preliminary" and "postliminary" activities under § 254(a) when they showered and changed their clothes immediately before and after working with toxic chemicals. After reviewing the statute's legislative history, the Court concluded that Congress "did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities." *Id.* at 256, 76 S.Ct. 330. Applying this standard, the Court quickly rejected the employer's argument that the Portal-to-Portal Act relieved it of the obligation to pay its employees for the activities in dispute, stating that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of

the principal activity of the employment than in the case of these employees." *Id.*

In light of *Steiner,* it is difficult to credit any argument that the Portal-to-Portal Act applies in this case. Like the clothes changing in *Steiner,* plaintiffs' donning of equipment is performed for the purpose of protecting the employee from work-related hazards and occurs immediately before entering the production area. Because plaintiffs need to put on the equipment in order to perform their job safely, their doing so is "an integral and indispensable part" of a "principal activity."

It is indispensable and integral in another sense as well because plaintiffs are *required* by both company policy and federal law to don and doff the equipment. *Ballaris v. Wacker Siltronic Corp.,* 370 F.3d 901, 911 (9th Cir.2004) (whether activity is required by employer is relevant to question whether activity is integral and indispensable part of principal activities); *Davis v. Charoen Pokphand (USA), Inc.,* 302 F.Supp.2d 1314, 1322 (M.D.Ala.2004) (same). In fact, employees at defendant's plant who fail to don the equipment may be subject to discipline. Thus, plaintiffs may not perform their jobs without the equipment.

Further, plaintiffs must don and doff the equipment at the plant, immediately before and after their productive activities. Employees do not have the option of keeping the equipment at home. *Lemmon v. City of San Leandro,* No. C 06-07107 MHP, 2007 WL

4326743, *5 (N.D.Cal. Dec.7, 2007) (noting that courts have found donning and doffing to be principal activity under *Steiner* when occurring at work place); *Abbe v. City of San Diego*, Nos. 05cv1629 DMS (JMA), 06cv0538 DMS (JMA), 2007 WL 4146696, *5 (S.D.Cal.2007) (same).

Defendant contends that these facts are insufficient to establish a "principal activity," citing *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 (2d Cir.2007), which read *Steiner* as being limited to "workplace dangers that transcend ordinary risks." The court reasoned as follows:

> At issue in *Steiner* was exposure to corrosive and toxic substances that permeated a battery plant; at issue here is the security of a nuclear power plant. The analogy is, however, unsustainable. . . . Without the taking of the measures required, the environment of the battery plant could not sustain life – given the toxic substances in liquid, solid, powder and vapor form (and in the dust of the air) that "permeate[d] the entire [battery] plant and everything and everyone in it." *Steiner* therefore supports the view that when work is done in a lethal atmosphere, the measures that allow entry and immersion into the destructive element may be integral to all work done there, just as a diver's donning of wetsuit, oxygen tank and mouthpiece may be integral to the work even

> though it is not the (underwater) task that the employer wishes done.

Id. (citations omitted).

This interpretation of *Steiner* is truly bizarre. The court appears to be saying that the holding of *Steiner* does not apply unless the "work is done in a lethal atmosphere." In other words, unless the activity is necessary to prevent the employee from actually *dying*, it is not "integral" to a principal activity. From a public policy perspective, this reading is obviously troubling because it creates an uncomfortable distinction between hazards that kill and hazards that maim (or pose only a *risk* of death) and suggests that an employee is entitled to compensation for protecting herself from the former only.

Fortunately, *Steiner* does not support such a distinction. Although it is true that the facts of *Steiner* involved life-threatening risks, the Court did not limit its holding to that situation, but said only that the facts before it presented one of the "clear[est]" examples of an activity that was integral and dispensable to the principal activity. *Steiner*, 350 U.S. at 256, 76 S.Ct. 330. Further, the legislative history cited by the Court distinguished between a job that the employee "could not perform . . . without putting on certain clothes" and an activity that was "merely a convenience to the employee and not directly related to the specific work." *Id.* at 258, 76 S.Ct. 330. Because the equipment in this case is donned for safety purposes and is required by law and company policy, it

cannot be said to be "merely a convenience" for the employee.

In *Gorman* the court also relied on the government's concession in *Steiner* that changing clothes "under normal conditions" would "ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time." *Steiner*, 76 S.Ct. at 331. However, I agree with those courts that have concluded that donning and doffing safety equipment cannot be equated with "changing clothes . . . under normal conditions." *E.g.*, *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL 32987224, *11 (N.D.Ala. Feb.4, 2002). Most people do not need to put on a hard hat and safety goggles to perform their jobs.

Whatever doubt *Steiner* may have left on this question was resolved by *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), another case involving the donning and doffing of protective gear (in that case, for workers in a meat plant) and walking to and from the production area. In *Alvarez* the Court did not explicitly hold that donning and doffing were "principal" activities under the Portal-to-Portal Act, but only because it did not have to. All parties agreed that "in light of *Steiner*, the donning and doffing of unique protective gear are 'principal activities' under § 4 of the Portal-to-Portal Act." *Id.* at 32, 126 S.Ct. 514. Using that position as a starting point, the Court went on to hold that if donning and doffing of protective gear are "principal activities," this necessarily means that another "principal activity" is walking between the locker

room (where the protective gear is donned and doffed) and the production area. *Id.* at 34, 126 S.Ct. 514.

After *Alvarez,* there can be little doubt that donning and doffing protective gear at the beginning and end of the workday are "principal activities" under the Portal-to-Portal Act. The Court could not have reached its conclusion regarding the walking time without concluding that donning and doffing protective gear are compensable activities. *Bishop v. United States,* 72 Fed.Cl. 766, 780 (Fed.Cl.2006) (concluding that in *Alvarez* Supreme Court "endorsed" the court of appeals' conclusion that donning and doffing of protective gear are "principal activities"). Further, the Court did not suggest that donning and doffing time was compensable only if the relevant gear was necessary to protect the employee from "a lethal atmosphere."

Defendant points to one sentence in *Alvarez,* 546 U.S. at 40, 126 S.Ct. 514, in which the Court stated that preshift activities may be "necessary" but still not "integral and indispensable" to a "principal activity." However, the Court made that observation in the context of discussing the time employees may wait before donning their equipment and after doffing it, an activity that is not at issue in this case. Further, in concluding that such waiting time was "preliminary" and "postliminary," the Court emphasized that it was "two steps removed from the productive activity on the assembly line," *id.* at 42, 126 S.Ct. 514, and that, "unlike the donning of certain types of protective gear, which is *always* essential if the worker is to do

his job, the waiting may or may not be necessary in particular situations or for every employee," *Id.* at 40, 126 S.Ct. 514 (emphasis in original). Thus, although the sentence defendant cites may suggest that the line between "preliminary" and "principal" activities will not always be a clear one, there is no room left to argue after *Alvarez* that donning and doffing of protective gear are not "principal activities" within the meaning of the Portal-to-Portal Act.

Defendant cites *Reich v. Oscar Mayer Foods Corp.*, No. 4:93CV204, 1995 WL 1765643, *2 (E.D.Tex. Mar.2, 1995), which concluded that donning and doffing safety equipment were "preliminary" and "postliminary" to a "principal activity" under the Portalto-Portal Act. However, the reasoning of *Reich* is conclusory and it was decided before the Supreme Court decided *Alvarez*. I do not find *Reich* to be persuasive.

2. *Changing clothes*

Defendant's second line of defense is 29 U.S.C. § 203(*o*), which states:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining

> agreement applicable to the particular employee.

For the purpose of this case, § 203(*o*) applies if two conditions are met: (1) the activity at issue constitutes "changing clothes"; and (2) the collective bargaining agreement excludes "changing clothes" from compensation. There is no dispute that the parties' collective bargaining agreement excludes from compensation any time spent changing clothes. The question is whether donning and doffing protective equipment constitute "changing clothes" under the statute.

The FLSA does not provide a definition for clothes, leaving the courts to struggle to come up with their own. But even the most liberal construction would not encompass some of the items at issue, such as earplugs and safety goggles, a point that defendant does not deny. Dft.'s Br., dkt. # 13, at 11 (acknowledging that earplugs and hair nets may not be "clothes"). Although defendant argues that the remaining articles are "clothes" under § 203(*o*), it fails to provide its own definition. Instead, it simply cites a few cases that have found similar articles to fall under the exclusion. None of these cases is persuasive. Like defendant, the court in one case concluded that the items at issue fell within § 203(*o*) but it failed to provide *any* definition of clothes. *Kassa v. Kerry, Inc.*, 487 F.Supp.2d 1063, 1067 (D.Minn.2007). The others simply adopt a definition of "clothes" as anything that covers the body, with little or no explanation. *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955-56 (11th

Cir.2007); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n. 3 (5th Cir.2001).

The view of the courts in *Anderson* and *Bejil* is inherently problematic because even those courts (and defendant) acknowledge that some articles used to cover the body may not be properly included within the meaning of "clothes" under § 203(*o*), such as armor or a space suit. Dft.'s Br. at 10; *Anderson*, 488 F.3d at 955 ("We recognize that there may be limits to the application of § 203(*o*) based on the nature or purpose of the garments at issue."); *see also Kassa*, 487 F.Supp.2d at 1067 ("whether a particular item of protective gear should be considered 'clothes' under § 203(*o*) depends on the exact nature of the item and the exact circumstances under which it is used"). Neither defendant nor these courts have provided a rationale for this distinction or a principle for determining when articles of protective gear are "clothes" under § 203 and when they are not. The logic appears to be little more than "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

The argument may be that any equipment worn is a piece of "clothes" under § 203(*o*) unless it is difficult to put on and take off. *Cf. Reich*, 38 F.3d at 1125 (concluding that time to don and doff items of protective equipment was "work" because it was "heavy and cumbersome, and it requires physical exertion, time, and a modicum of concentration to put them on securely and properly"). Alternatively, the view may be similar to the one in *Garmon*, that only

articles designed to prevent life-threatening hazards are deemed worthy of FLSA protection. But neither of these rationales is supported by any particular definition of "clothes," the purpose of the FLSA or the meaning of "work" as defined by the Supreme Court, which has consistently rejected a view of work that is limited to physically demanding activities.

Rather, I agree with the court in *Fox,* 2002 WL 32987224, at *6-7, that "changing clothes" is "an everyday, plain-language term that describes what most people do every day – taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening." This view makes the relevant questions straight forward: Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason? Under this understanding of "changing clothes," putting on a uniform would not be covered under the FLSA under ordinary circumstances, *e.g., Turner v. City of Philadelphia,* 262 F.3d 222 (3d Cir.2001), but donning and doffing equipment used to protect against hazards particular to the workplace would be covered.

As the court explained in *Fox,* 2002 WL 32987224, at *6-7:

> The donning of [sanitation and safety] equipment is much different than the time spent by a police officer putting on a uniform and

> strapping on a holster. The uniform is "clothes" because it takes the place of the clothing the officer was wearing before work. Furthermore, . . . a police officer may drive to work in his uniform. . . . The equipment at issue here cannot be regarded as mere analogs to everyday clothing, like a uniform might be; the equipment is necessary not for the convenience or modesty of the employee, but required for the very specific needs of the employer for sanitation and safety.

This construction of the statute is consistent with both the purpose of § 203(*o*) and sound policy. As noted by the court in *Anderson,* 488 F.3d at 958, the purpose of § 203(*o*) was similar to that of the Portal-to-Portal Act, which was to prevent overly expansive interpretations of the FLSA that would impose liability for activities that employers could not have reasonably anticipated and were largely outside the employer's control, such as traveling between home and work. *Alvarez,* 546 U.S. at 26, 126 S.Ct. 514. Like commuting, employers have no control over an employee's dressing habits at home. Further, because dressing is something that everyone must do anyway, it is inconsistent with the meaning of "work." Similarly, "washing" (also excluded by § 203(*o*)), is an activity that employees perform regardless of their particular job responsibilities.

The same cannot be said for donning and doffing safety and sanitation equipment on the work site. Those are activities performed for the employer, for a uniquely job-related purpose and are under the

employer's control. Also important is the safety-related purpose of this equipment. Without an explicit mandate, one would not expect that Congress intended to allow employee safety and sanitation to become a bargaining chip in contract negotiations. *Alvarez,* 339 F.3d at 905 ("[I]t would not be in the interest of public policy to allow disincentives for employers and employees to use government-mandated personal protective equipment.") Accordingly, I cannot conclude that defendant has shown as a matter of law that the items of personal protective equipment at issue in this case are "clothes" within the meaning of § 203(*o*).

3. *De minimis*

Defendant's final argument under the FLSA is that the amount of time it takes employees to don and doff their equipment and walk between the locker room and the production area is "de minimis" and is therefore not compensable. I must reject defendant's argument for two reasons.

First, defendant has adduced no evidence regarding the amount of time it takes to perform the activities at issue. Because defendant seeks to rely on an exception to the rule, it is defendant's burden to prove that the exception applies. *Walling v. General Industries Co.,* 330 U.S. 545, 547-48, 67 S.Ct. 883, 91 L.Ed. 1088 (1947); *Yi v. Sterling Collision Centers, Inc.,* 480 F.3d 505, 507 (7th Cir.2007) ("[T]he burden of proving entitlement to an exemption is on the defendant.").

Thus, defendant's failure to adduce evidence on this point is fatal to its argument.

Defendant suggests that the court could take judicial notice of the fact that the time in question is de minimis, but it cites no cases in which a court has done so. In fact, the Supreme Court expressly declined to rule on the question in *Anderson,* 328 U.S. at 692, 66 S.Ct. 1187, so that "the trier of facts [could] mak[e] more definite findings as to the amount of walking time in issue." As in *Anderson,* the greatest variable in this case involves walking time. The diagrams submitted by defendant suggest that the plant is a large one, making it plausible that walking time alone is several minutes.

Second, even if the total time at issue is only a few minutes, this would not necessarily mean that the time was not compensable. The "de minimis" exception has no statutory basis and *Anderson* is the only case in which the Supreme Court considered the exception's application. (Apparently, in *Alvarez* the parties did not raise the issue before the Supreme Court and the Court ignored it.) Although a number of courts have concluded that any task or group of tasks is not compensable if it takes less than 10 minutes, *e.g., Reich,* 38 F.3d at 1126, no court has explained why 10 minutes of work is worthy of compensation but 9 minutes and 59 seconds is not. In *Anderson,* the Court did not suggest that the exception was meant to be a judgment that an employee's work is free for the employer once it falls below some arbitrary amount of time. Rather, the Court stated

that in some instances compensating employees for "a few seconds or minutes of work" will not be feasible "in light of the realities of the industrial world." *Id.*

This suggests a standard that considers not just the time involved, but also the difficulty of measuring that time. In other words, the need to compensate an employee for her work must be weighed against the cost or difficulty of providing compensation. As the amount of time decreases for an employee to perform tasks, so does the employer's duty to provide compensation for those tasks when doing so would impose an administrative cost. *Cf. Tennessee Coal, Iron & Rail Co.*, 321 U.S. at 603, 64 S.Ct. 698 ("This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible.") However, when providing compensation for a task imposes no additional burden on the employer, there is no justification for denying the employee compensation for that task, regardless how fast the task was performed. Any other rule would deny employees "the just remuneration guaranteed them by the Act for contributing their time, liberty and strength primarily for the benefit of others." *Id.* After all, many jobs could be divided up into tasks that take only a few minutes a piece. Taken to its logical conclusion, a "de minimis" rule that focuses only on time could swallow up an entire shift.

This understanding is consistent with the recent holding of the Court of Appeals for the Third Circuit,

which stated in a similar case that the "de minimis" exception

> applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374-75 (3d Cir.2007). Other courts have reached a similar conclusion that they must consider the administrative burden on the employer when determining whether the "de minimis" exception applies. *E.g., Lindow v. United States,* 738 F.2d 1057, 1063 (9th Cir.1984) (courts should consider "the practical administrative difficulty of recording the additional time"). Because defendant has not adduced any evidence that it would be difficult to compensate plaintiffs for donning and doffing the personal protective equipment, I cannot conclude that those activities are "de minimis" as a matter of law.

Defendant makes a number of new arguments in its reply brief, none of which is persuasive and in any event may not be considered because plaintiffs had no opportunity to respond to them. *Nelson v. LaCrosse County District Attorney,* 301 F.3d 820, 836 (7th

Cir.2002). Accordingly, I must deny defendant's motion for summary judgment with respect to plaintiff's claims under the FLSA.

B. *State Law Claims*

Plaintiffs bring three state law claims: (1) failure to pay wages, as required by Wis. Stat. § 109.03; (2) failure to pay over time, as required by Wis. Stat. § 103.02; and (3) failure to keep adequate records, as required by Wis. Admin. Code §§ DWD 272.10 and 274.06. Defendant has moved for summary judgment on all three claims, primarily on grounds unrelated to the merits. Defendant says that all of plaintiffs' state law claims are preempted by federal law and that there is no right of action under Wisconsin law for failing to keep records.

1. *Preemption*

Defendant identifies four different theories of preemption that it believes apply in this case: (1) "complete dominance"; (2) "*Garmon* preemption"; (3) "*Machinists* preemption"; and (4) preemption under § 301 of the Labor Relations Management Act (29 U.S.C. § 185(a)). Each of defendant's theories fails.

What defendant calls in its brief in chief "complete dominance" preemption (a term that is not used in the case law to describe any theory of preemption) becomes a theory of conflict preemption in defendant's reply brief. Defendant says that any state law

requiring compensation for the activities at issue in this case would conflict with § 203(*o*), which defendant says "authorizes parties to negotiate over donning and doffing activities and exclude them from compensable hours worked." Dft.'s Reply Br., dkt # 24, at 18. But this argument is contingent on a conclusion that the donning and doffing of personal protective equipment falls within the meaning of "changing clothes" under § 203(*o*). Because I have rejected that conclusion, I must similarly reject defendant's argument of conflict preemption. If § 203(*o*) permits *federal* law claims under the FLSA for donning and doffing personal protective equipment, there is no conflict between § 203(*o*) and a *state* law that permits such a claim.

Defendant's reliance on *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244-45, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), fares no better. *Garmon* "forbids state and local regulation of activities that the [National Labor Relations Act] protects or prohibits or arguably protects or prohibits," *Cannon v. Edgar,* 33 F.3d 880, 884 (7th Cir.1994), and *Machinists* "prohibits state and municipal regulations of areas that Congress left to the free play of economic forces," *Id.* at 885.

Neither *Garmon* nor *Machinists* applies. Defendant's argument under *Machinists* again relies on an

assumption that Congress has expressed its intent to make the collective bargaining process the sole method of obtaining compensation for donning and doffing of personal protective equipment. However, as I discussed above, the FLSA supports a view that Congress intended to take those activities *away* from the vagaries of collective bargaining.

With respect to its argument under *Garmon*, defendant fails to identify any provision of the NLRA that bars plaintiffs' state law claims. It cites 29 U.S.C. § 158(d), which it says preempts plaintiffs' state law claims because § 158(d) requires employers to engage in collective bargaining with respect to "wages" and "hours." Defendant appears to hold the view that if Congress requires employers to engage in collective bargaining on a particular matter, states are powerless to impose any requirements that touch on any aspect of that matter. If such a state law is allowed to survive, defendant reasons, employers will be "forced" to choose between following federal law (which requires bargaining) and state law (which imposes a non-negotiable requirement).

Defendant's alleged dilemma is illusory. If defendant's view of the law were correct, it would mean that defendant was being forced to violate the law continually. Of course, *federal* law imposes numerous requirements that limit defendant's ability to engage in collective bargaining on issues related to "wages" and "hours," but this does not mean that defendant is violating its duties under § 158(d) by complying with those other laws. Section 158(d) simply imposes a

duty to bargain "in good faith." Obviously, if state or federal law has removed a particular issue from the bargaining table, there is no bad faith in failing to engage in negotiating on that issue. *Livadas v. Bradshaw,* 512 U.S. 107, 130, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) ("[W]e have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course.")

Further, adopting defendant's view would mean that states are barred from enacting almost any labor legislation. Section 158(d) requires employers to engage in bargaining not only with respect to "hours" and "wages" but also "terms and conditions of employment" in general. Thus, defendant's view is that federal law preempts any state law claim involving a matter that is subject to collective bargaining. This argument simply has no support in the law, under any theory of preemption. "[F]ederal labor policy does not prevent states from providing workers with substantive rights independent of the collective bargaining relationship." *Douglas v. American Information Technologies Corp.,* 877 F.2d 565, 569 (7th Cir.1989). Thus, it is not surprising that defendant has failed to cite any cases adopting its view of preemption under *Garmon.*

Finally, defendant relies on 29 U.S.C. § 185(a) (§ 301 of the Labor Relations Management Act), which preempts state law claims that require interpretation of a collective bargaining agreement. *Chicago District Council of Carpenters Pension Fund v.*

Reinke Insulation Co., 464 F.3d 651, 657 (7th Cir.2006). That section has no application in this case because plaintiffs' claims have nothing to do with enforcing or interpreting a collective bargaining agreement. Defendant did not even attempt to explain how plaintiffs' claims required an interpretation of the collective bargaining agreement until its reply brief, in which it argued weakly that plaintiffs' state law claims will require interpretation of the agreement terms "hours worked" and "regular rate of pay." Dft.'s Reply Br., dkt, # 24, at 26.

Defendant fails to explain why construction of those terms is necessary. Neither side suggests that there is any dispute over the "regular rate of pay." Although the "hours worked" are in dispute, this is a dispute over the meaning of state and federal law, not the collective bargaining agreement. Defendant may have to *calculate* the hours and rate of pay to determine damages, but that is not enough to trigger preemption. *Livadas*, 512 U.S. at 124-25, 114 S.Ct. 2068; *In re Bentz Metal Products Co., Inc.*, 253 F.3d 283, 285 (7th Cir.2001) ("[A] state law claim is not preempted if it does not require interpretation of the [collective bargaining agreement] even if it may require reference to the [agreement].")

Defendant cites numerous cases of the court of appeals but none is instructive. In each case, it was impossible to decide the state law claim without construing a disputed provision in the collective bargaining agreement. *Baker v. Kingsley*, 387 F.3d 649, 659 (7th Cir.2004) (finding preemption under

§ 185(a) because success on state law claim required determination under collective bargaining agreement whether employees were "terminated or . . . are permanently laid off, pursuant to Section 8(I)(b) of this Agreement"); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 725 (7th Cir.2000) (tortious interference with contract claim preempted because claim was really one for violation of collective bargaining agreement); *Atchley v. Heritage Cable Vision Associates*, 101 F.3d 495, 500 (7th Cir.1996) (state law wage claim preempted because it turned on "whether there was an obligation under the [collective bargaining agreement] to provide the payments at a certain time and, if so, whether the employer breached that implied contract provision"); *Douglas*, 877 F.2d at 571 (claim for intentional infliction of emotional distress preempted because determination whether conduct was "extreme and outrageous" would turn on rights granted under collective bargaining agreement).

The only case addressing a similar issue was cited by plaintiffs (and ignored by defendant until its reply brief). In *United Food & Commercial Workers Union, Local 1473 v. Nestle USA, Inc.*, No. 06-C-595-S, 2006 WL 3474198, *2 (W.D.Wis. Nov.29, 2006) (Shabaz, J.), the court considered whether § 185(a) preempted state law claims for donning and doffing "work clothes." The court rejected the defendant's arguments that it did, concluding that all of the factual and legal determinations in the case were "irrelevant" to the collective bargaining agreement. Defendant criticizes plaintiffs for relying on this case

because it is nonprecedential (calling plaintiffs' discussion of the case "inappropriate" and a "cheap shot"), but the same could be said of any district court opinion. In any event, I agree with plaintiff that § 185(a) does not preempt plaintiffs' state law claims because defendant has failed to show that it is necessary to interpret any provision of the collective bargaining agreement in order to decide those claims.

2. *Record keeping claim*

Plaintiffs devote one sentence of their brief to their argument that Wisconsin law recognizes a private cause of action for an employer's failure to keep adequate records: "It is settled Wisconsin law that employees can enforce [the regulations requiring record keeping, Wis. Admin. Code §§ DWD 272.10 and 274.06] under § 109.03(5). *German v. Wisconsin Dept. of Transportation,* [2000 WI 62,] 235 Wis.2d 576, 586-87, 612 N.W.2d 50 (2000)." Plts.' Br., dkt. # 21, at 36. That is incorrect. Section 109.03(5) authorizes a cause of action "for the full amount of the employee's wages." It has nothing to do with record keeping. The question in *German,* 2000 WI 62, at ¶ 2, 235 Wis.2d 576, 612 N.W.2d 50, was whether employees could sue under § 109.03(5) for *wages* they believed they were due for meal breaks. The supreme court did not hold that the record keeping regulations could be enforced under § 109.03(5) or any other statute. In fact, the court did not even discuss those regulations.

Plaintiffs provide no other authority for a private right to enforce the record keeping regulations. Without a showing that the legislature intended to create a private civil remedy, plaintiffs cannot seek relief in this court. *Antwaun A. v. Heritage Mutual Insurance Co.*, 228 Wis.2d 44, 66, 596 N.W.2d 456 (1999). Defendant's motion for summary judgment will be granted with respect to this claim.

3. *Merits*

Defendant does not develop a separate argument related to the merits of plaintiffs' state law claims, but says only that the standards are the same under state and federal law regarding whether an activity is "de minimis" or "preliminary" or "postliminary." Because I have rejected defendant's arguments on these issues on plaintiffs' federal claim, it is unnecessary to consider them again with respect to plaintiffs' state law claims.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Kraft Foods Global, Inc. is GRANTED with respect to plaintiffs' claim under Wis. Admin. Code §§ DWD 272.10 and 274.06. Plaintiffs' complaint is DISMISSED with respect to that claim. Defendant's motion for summary judgment is DENIED in all other respects. The clerk of court is directed to set a date for a scheduling conference before Magistrate Judge Stephen Crocker to

determine a new deadline for filing a motion for class certification and to make any other necessary adjustments to the schedule.

29 U.S.C. § 151 Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain

collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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29 U.S.C. § 157 Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

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29 U.S.C. § 158 Unfair labor practices

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect

a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty *days* after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the

expiration date of such contract, whichever occurs later:

* * *

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29 U.S.C. § 185 Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * *

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29 U.S.C. § 203 Definitions

As used in this chapter –

* * *

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and

mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

* * *

29 U.S.C. § 203 Definitions

As used in this chapter –

* * *

(o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * *

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29 U.S.C. § 206 Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands: employees in American Samoa; seamen on American vessels: agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than –

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

* * *

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29 U.S.C. § 207 Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such

workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 –

* * *

> (C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

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29 U.S.C. § 218 Relation to other laws

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of

employment maintained by him which are shorter than the maximum hours applicable under this chapter.

* * *

Wis. Stat. § 103.02 Hours of labor

No person may be employed or be permitted to work in any place of employment or at any employment for such period of time during any day, night or week, as is dangerous or prejudicial to the person's life, health, safety or welfare. The department shall investigate, ascertain, determine and fix such reasonable classification, and promulgate rules fixing a period of time, or hours of beginning and ending work during any day, night or week, which shall be necessary to protect the life, health, safety or welfare of any person, or to carry out the purposes of ss. 103.01 to 103.03. The department shall, by rule, classify such periods of time into periods to be paid for at regular rates and periods to be paid for at the rate of at least one and one-half times the regular rates. Such investigations, classifications and orders shall be made as provided in s. 103.005 and the penalties under s. 103.005(12) shall apply to and be imposed for any violation of ss. 103.01 to 103.03. Such orders shall be subject to review in the manner provided in ch. 227. Section 111.322(2m) applies to discharge or other discriminatory acts arising in connection with any proceeding under this section.

Wis. Stat. § 109.03 When wages payable; pay orders

* * *

The required frequency of wage payments provided in this subsection does not apply to any of the following:

(a) Employees covered under a valid collective bargaining agreement establishing a different frequency for wage payments, including deferred payments exercised at the option of employees.

(b) School district and private school employees who voluntarily request payment over a 12-month period for personal services performed during the school year, unless such employees are covered under a valid collective bargaining agreement which precludes this method of payment.

(c) Unclassified employees of the university of Wisconsin system.

(d) Employees who receive compensatory time off under s. 103.025 in lieu of overtime compensation.

(e) A part-time fire fighter or a part-time emergency medical technician who is a member of a volunteer fire department or emergency medical services program maintained by a county, city, village, or town or of a volunteer fire company organized under ch. 181 or ch. 213 and who, by agreement between the fire fighter or emergency medical technician and the entity employing the fire fighter or emergency medical technician, is paid at regular intervals, but no less often than annually.

(2) **Payment to discharged or resigned employees.** Any employee, except a sales agent employed on a commission basis, not having a written contract for a definite period, who quits employment or who is discharged from employment shall be paid in full by no later than the date on which the employee regularly would have been paid under the employer's established payroll schedule or the date of payment required under sub. (1), whichever is earlier.

* * *

Wis. Admin. Code DWD § 272.12 Interpretation of hours worked.

(1) Principles for determination of hours worked. (a) *General requirements of sections.* 1. Employees subject to the statutes must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business." The workweek ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place."

2. "Workday," in general means the period between "the time on any particular workday at which such employee commences their principal activity or activities" and "the time on any particular workday at which they cease such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases their "principal" activities.

* * *

Wis. Admin. Code DWD § 274.03 Overtime pay.

Except as provided in s. DWD 274.08, each employer subject to this chapter shall pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

CONGRESSIONAL RECORD – HOUSE

Excerpts From House Debate on
Amendments to Fair Labor Standards Act

August 10, 1949

* * *

Mr. HERTER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Herter to the Lucas substitute: Page 6, after line 12, insert a new paragraph as follows:

"(o) Hours worked: In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

Mr. HERTER. Mr. Chairman, this amendment is an amendment to the definitions under the act. It is offered for the purpose of avoiding another series of incidents which led to the portal-to-portal legislation and led to the overtime-on-overtime legislation.

At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective-bargaining agreements but have not necessarily been defined in the same ways.

Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.

The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day." That situation may arise at any moment. This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

Mr. McCONNELL. Mr. Chairman, will the gentleman yield?

Mr. HERTER. I yield to the gentleman from Pennsylvania.

Mr. McCONNELL. May I say to the distinguished gentleman from Massachusetts that I favor his amendment as offered.

Mr. HERTER. I appreciate what the gentleman has said.

Mr. LUCAS. Mr. Chairman, will the gentleman yield?

Mr. HERTER. I yield to the gentleman from Texas.

Mr. LUCAS. I do not oppose the gentleman's amendment, although I must say about it as I have said about the Cooper amendment that I do not think it is necessary. The Portal-to-Portal Act was intended to cover just such situations as the gentleman describes. However, if the gentleman insists upon reenacting certain provisions of the Portal-to-Portal Act or the meaning of the provisions of the Portal-to-Portal Act in this bill, I can offer no objection.

Mr. HERTER. The gentleman's interpretation of the Portal-to-Portal Act, I am afraid, may not be shared by others who fear that there may be a loophole here. That is all I am trying to cover, to avoid the kind of misunderstanding that arose before.

Mr. LUCAS. It is my understanding that both the unions and management desire this amendment.

Mr. HERTER. So I understand.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was agreed to.

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDTSON, on behalf of themselves and all others who consent to become Plaintiffs and similarly situated employees,

Plaintiffs,

vs.

KRAFT FOODS GLOBAL, INC., OSCAR MAYER FOODS DIVISION,

Defendant.

Case No. 07-C-0300-C

(Filed Sep. 8, 2008)

PLAINTIFFS' AND DEFENDANT'S JOINT PROPOSED STIPULATION OF FACTS AND CONCLUSIONS OF LAW

Pursuant to the Parties' Settlement Agreement, Plaintiffs and Defendant (the "Parties") submit the following joint stipulation of facts and conclusions of law for the Court's determination of their respective motions for summary judgment.

1. Kraft Foods Global, Inc. ("Defendant" or "Kraft") is a Delaware corporation with its principal office in Northfield, Illinois. Kraft operates a meat processing plant in Madison, Wisconsin through its Oscar Mayer Foods Division (the "Oscar Mayer Facility").

2. Plaintiffs include the Named Plaintiffs (defined below in paragraph 4), the members of the Wisconsin Class (defined below in paragraph 8), and the Opt-In Plaintiffs (defined below in paragraph 9). Plaintiffs are current or former "employees," as that term is defined in 29 U.S.C. § 203(e)(1) and Wis. Stat. §§ 103.001(5), 104.01(2) and 109.01(r), either currently or previously employed at Kraft's Oscar Mayer Facility.

3. Kraft is an "employer" as that term is defined in 29 U.S.C. § 203(d) and Wis. Stat. §§ 103.001(6), 104.01(3), and 109.01(2).

4. Named Plaintiffs, Jeff Spoerle, Nick Lee, Kathi Smith, and Jason Knudson, are hourly employees who work at the Oscar Mayer Facility. Kraft currently employs approximately 930 hourly employees at the Oscar Mayer Facility.

5. In their Amended Complaint, Plaintiffs assert claims for unpaid wages, liquidated damages, injunctive relief and attorneys fees under the Fair Labor Standards Act ("FLSA Claims") and unpaid wages and penalties under the Wisconsin wage payment laws ("Wisconsin Claims") for unpaid time spent donning and doffing certain company-issued articles Kraft requires them to wear while they work, and for unpaid time they are required to spend walking between the company locker rooms and their workstations at the beginning and end of their assigned shifts.

6. Plaintiffs also assert a claim for failing to maintain accurate records pursuant to the FLSA of all hours worked by Plaintiffs on behalf of Kraft.

7. In its Answer to the Amended Complaint, Kraft denied, and it continues to deny, any and all allegations of wrongdoing or statutory violations made in the above-captioned lawsuit.

8. Plaintiffs have stipulated and agreed to dismiss with prejudice all claims under the FLSA and the Wisconsin wage payment laws for liquidated damages and/or penalties, to limit the actionable period applicable to their FLSA Claims to two years, and to dismiss with prejudice their claims for violations of the recordkeeping provisions of the FLSA.

9. Kraft has stipulated (1) to limit its defense to Plaintiffs' remaining FLSA Claims to its argument regarding the applicability of FLSA Section 203(o); and (2) to limit its defense to the remaining Wisconsin Claims to its arguments that such claims are preempted by the NLRA, Section 301 of the LMRA, and/or the FLSA pursuant to the Supremacy Clause of the U.S. Constitution. Kraft withdraws all other defenses asserted throughout the course of the litigation to both the FLSA Claims and the Wisconsin Claims, including but not limited to, the arguments that the donning, doffing and walking activities at issue in this case are not compensable since: (a) the activities are preliminary/postiliminary activities; (b) the activities are *de minimis* activities; or (c) the

claims for compensation of such activities are barred by the doctrines of waiver, estoppel and/or laches.

10. On May 6, 2008, the Court granted class certification of the Wisconsin Claims for a class of "all current and former Kraft hourly employees employed at Kraft's Oscar Mayer plant in Madison, Wisconsin who were not paid regular or overtime pay for time spent donning and doffing personal protective equipment and walking to and from their work stations" (the "Wisconsin Class");[1] certified the Named Plaintiffs as representative plaintiffs for the Wisconsin Class and the Opt-In Plaintiffs, and Class Counsel as counsel representing the Wisconsin Class for all litigation and settlement purposes; and authorized Class Counsel to mail an FLSA opt-in notice to all members of the Wisconsin Class to give them an opportunity to opt-into the above-captioned action by filing form Consents to Sue and/or to opt-out of the Wisconsin Class.

11. Subsequently, 782 members of the Wisconsin Class filed timely Consents to Sue by which they designated the Named Plaintiffs and Class Counsel as their representatives for all purposes, including litigation and settlement (the "Opt-In Plaintiffs"), and affirmatively joined the above-captioned action (*Exhibit 2*); 15 members of the Wisconsin Class

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[1] The Plaintiffs are employees who work in the departments listed in the attached *Exhibit 1* (generally, production, sanitation and maintenance).

affirmatively opted out of the Wisconsin Class (*Exhibit 3*).

12. As a processor of food products, Kraft is required to comply with certain United States Department of Agriculture regulations. In addition, Kraft has implemented its own Sanitation Standard Operating Procedures, and uses Good Manufacturing Practices to reduce the likelihood of introducing contaminants to the food products and the manufacturing processes.

13. As an employer, Kraft is also required to comply with various safety and health regulations promulgated under the Occupational Safety & Health Act. In addition, Kraft has implemented its own safety policies and procedures dictating that certain employees wear certain articles in the performance of certain work activities. Kraft provides annual training to all employees on its policies and procedures.

14. Attached hereto and incorporated herein are the following Kraft policies and procedures that relate to sanitation and safety in the Oscar Mayer Facility:

- *Exhibit 4:* Sanitation Standard Operating Procedures
- *Exhibit 5:* Madison Plant Safety Rules SAF-511
- *Exhibit 6:* Madison Plant Sanitation & Hygiene Requirements

- *Exhibit 7:* Personal Protective Equipment – SAF 529
- *Exhibit 8:* Madison Plant Guidelines
- *Exhibit 9:* Madison Plant Head Protection Policy

15. There are a number of articles worn by Plaintiffs at the Oscar Mayer Facility: fabric pants, fabric shirt, coveralls, insulated coveralls, polyester frock, hairnet, beard net, ear plugs, ear muffs, hardhat, bump cap, paper frock, vinyl aprons, paper sleeves, cotton gloves, latex gloves, maintenance jacket, material handler or freezer coat, safety glasses, rubber slickers (pants and an overcoat), rubber boots, work boots, or shoe rubbers. Some of these articles are optional (*i.e.*, not required to be worn by Kraft). Other articles are required to be worn by some but not all of the Plaintiffs, depending on their job duties and responsibilities.

16. Most of the articles worn by Plaintiffs are put on (donned) and taken off (doffed) in the production areas after the start and before the end of their work shift. Certain of the articles required by Kraft to be worn by the Plaintiffs, however, are donned before the commencement of the work shift and doffed after the completion of the work shift.

17. The only articles required by Kraft to be donned before the work shift and doffed after the work shift by Plaintiffs, and thus at issue in this

litigation, are: captive footwear (shoe rubbers, over-the-calf rubber boots,[2] or work boots),[3] hairnets,[4] beard nets (if an employee has a beard), hardhats or bump caps,[5] frocks or career clothing (shirt, pant and jacket) (hereafter collectively referred to as the "Articles"). Plaintiffs are not permitted to remove any of the Articles from the Madison Facility. Attached hereto and incorporated herein are photographs of the Articles as follows:

- *Exhibit 10:* hardhat
- *Exhibit 11:* bump cap
- *Exhibit 12:* hairnets (of all three colors)
- *Exhibit 13:* beard net

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[2] The over-the-calf rubber boots are principally worn by Plaintiffs who work in the Sanitation Department. The over-the-calf boot is chemical resistant and waterproof. This provides additional protection to Plaintiffs who work in Sanitation with various chemicals.

[3] Plaintiffs have the option to choose between which style of captive footwear they desire to wear.

[4] Hairnets come in one of three colors: red, blue or white. The hairnets are color-coded to indicate whether an employee works with Raw products (red), ready-to-eat (RTE) products (white), or travels throughout the plant (blue). Having multi-colored hairnets allows management to more quickly identify the areas in which employees work and to take steps to minimize cross-contamination issues.

[5] Some Plaintiffs are required to wear the hardhat as opposed to the bump cap (e.g., Plaintiffs who work in the warehouse), others have the option to choose which to wear.

- *Exhibit 14-17:* captive footwear (four styles)
- *Exhibit 18:* frock
- *Exhibit 19-21:* career clothing (shirt, pant, and jacket, respectively)

18. The white, polyester frocks (similar to a white lab coat) are professionally cleaned each day and maintained in the frock room located directly across from the men's locker room and adjacent to the women's locker room. Plaintiffs who wear frocks are required to obtain them from the frock room, carry them to their production areas and don them there. At the end of their work shift, Plaintiffs are required to doff their frocks outside the production areas, and carry them back to the dirty laundry containers located outside the locker rooms to reduce the likelihood of cross-contamination. At least since 1959, pursuant to the collective bargaining agreement between the UFCW and Kraft, Kraft pays for the daily professional cleaning of the frocks.

19. The frock ensures that Plaintiffs who work in food production areas have clean outerwear. It is worn over Plaintiffs' own clothing, and is a convenience in the sense that it protects Plaintiffs' own clothing from soiling and damage.

20. Kraft also provides Plaintiffs who work in the Maintenance, Spice, or Power Plant Departments the option to wear company-provided shirts, pants, and jackets if they wish ("career clothing"). The only Plaintiffs required to wear career clothing are

Electrical Technicians (who are part of the Maintenance Department) for whom the cotton fabric provides arc protection. Most of the Plaintiffs in the Maintenance Department work with machinery and therefore choose to wear the career clothing because it protects their own clothing from being damaged, soiled or ripped. When a Plaintiff wears career clothing, he or she will normally remove his or her own clothing to wear the career clothing, except that Plaintiffs sometimes wear their regular shirts under the career shirts.

21. Plaintiffs are provided with lockers where they can remove and store their street shoes, coats and additional personal clothing or articles that they wear into work on any given day. Kraft requires Plaintiffs to maintain their hardhats or bump caps in their lockers, and their captive footwear in the shoe racks immediately below their lockers. Plaintiffs generally don their captive footwear and, if worn, career clothing, in the locker rooms. Plaintiffs may also don their hairnets, beard nets (if needed), and hardhats or bump caps there as well; Plaintiffs may also don these articles on the way to their production area.[6]

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[6] Most Plaintiffs maintain supplies of hairnets and beard nets in their lockers. Hairnets and beard nets are also maintained in storage areas in the main hallway on the way to the production areas or in the Green Rooms adjacent to the production areas.

22. Plaintiffs' hours of work are tracked using a Kronos time clock process. All employees are issued credit card-like identification badges and are required to swipe their badge at a time clock at the commencement of the work shift prior to entering the production area, and to swipe their badges again at the end of the work shift upon leaving the production area. Plaintiffs are not compensated for the time spent walking to their production areas before their work shift begins or walking back to their lockers after they have clocked out.

23. Plaintiffs only clock in and out at the start and conclusion of their work shifts. Plaintiffs are not required to clock in or out for breaks or lunch unless they leave the premises. The time clocks are located throughout the Oscar Mayer Facility, with clocks on each floor in various locations, generally adjacent to the area where productive work is performed.

24. Also adjacent to the production areas are a number of "Green Rooms" where the articles that are donned after the work shift begins and doffed before the work shift ends are maintained, such as gloves (latex as well as cotton), paper frocks, sleeves, slickers, etc., and where used or dirty articles can be discarded or recycled. (These articles are not at issue in this case.) The Green Rooms also have hooks on which employees hang their frocks when they are leaving the production area for breaks; a means by which the likelihood of cross-contamination is reduced.

25. Kraft requires Plaintiffs to wear captive footwear as another means to eliminate the introduction of bacteria into the food production. The captive footwear is worn instead of Plaintiffs' own footwear and is not permitted to leave the Oscar Mayer Facility.

26. Further protection from contamination is provided by maintaining anti-bacterial footbaths at the entry to all production areas, and by requiring all employees to walk into and through these footbaths whenever entering and leaving a production area. The anti-bacterial footbaths contain chemicals that are designed to kill bacteria that may exist or have been picked up on the captive footwear.

27. The captive footwear comes with thick rubber-type soles intended to be chemical resistant and water proof to allow longer footwear life when worn through the chemical footbaths. The captive footwear provides a convenience to Plaintiffs in the sense that it preserves Plaintiffs' own shoes from wear and damage due to the chemical footbaths. The captive footwear also has steel or reinforced toes, which provide protection from compression injuries for those Plaintiffs who may work in areas with falling objects, and has treading that is slip resistant and designed to not hold meat particles.

28. The average time it takes Plaintiffs to don and doff the Articles and to walk to and from their

time clocks from the locker rooms are set forth in *Exhibit 22*.[7]

29. Since 1937, the Plaintiffs have been represented by the United Food and Commercial Workers Union, Local 538 (the "UFCW") in the negotiation of all terms and conditions of employment, including compensation, which are typically reflected in a collective bargaining agreement (a "CBA").

30. In the past, the UFCW and Kraft (or its predecessors) have expressly negotiated the compensation to Plaintiffs for time spent donning and doffing the Articles. Paragraph 69 of the 1956 CBA provided as follows:

> Each employee shall be allowed twelve (12) minutes per day for the time spent changing clothes incident to employment, this time to be added to employee's daily work time. Time allowed for preparing special tools, etc., shall be added to the employee's daily work time.

This identical provision (hereinafter referred to as the "clothes changing provision") remained in each CBA until 1985, though the numbering may have changed.

31. During negotiations held in 1984, Kraft sought to delete the clothes changing provision from

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[7] "Gather[ing] work materials" and "remov[ing] work items from career cloth[ing]," as listed in Exhibit 22, are incident to the donning and doffing of career clothing and not independent acts of donning and doffing.

the CBA but the UFCW rejected this proposal and the provision remained.

32. Near the end of 1984, after extensive negotiations, Kraft presented the UFCW with its last and best offer for a new CBA. The offer was rejected by the UFCW, Kraft declared an impasse and implemented the wage reduction from $10.69/hour to $8.25/hour from its final offer; no other provisions were implemented, no benefits were reduced and the clothes changing provision remained intact.

33. In early 1985, after additional negotiations, Kraft proposed an increase in wages from $8.25/hour to $9.25/hour with a further increase to $10.00/hour in September, 1985, in return for a reduction in benefits, including the elimination of the clothes changing provision. On May 12, 1985, the UFCW members ratified the proposal.

34. The following year, 1986, during formal collective bargaining negotiations, the UFCW sought to reinstate the clothes changing provision. Kraft refused to do so and the UFCW ultimately withdrew this demand.

35. In 1989, also during formal collective bargaining negotiations, the UFCW again unsuccessfully sought to reinstate the clothes changing provision.

36. At no point during any subsequent negotiations between the UFCW and Kraft has the UFCW proposed to include the clothes changing provision or sought any compensation for the donning and doffing

activities at issue in this litigation. Since 1985, Kraft has not paid its employees for the type of donning and doffing activities at issue in this litigation.

37. Attached hereto and incorporated herein are the following:

Exhibit 23: A copy of the current collective bargaining agreement.

Exhibit 24: A copy of a portion of the 1956 collective bargaining agreement which contains paragraph 69 – the clothes changing provision.

Exhibit 25: A copy of a portion of the 1979 collective bargaining agreement which contains paragraph 73 – the clothes changing provision.

Exhibit 26: A copy of the company's 1984 proposal.

Exhibit 27: A copy of the 1985 Memorandum of Agreement ratified by the UFCW membership.

Exhibit 28: A copy of the minutes from an August 18, 1986 collective bargaining session between the UFCW and Kraft that reflects the UFCW's economic proposals.

Exhibit 29: A copy of the July 10, 1989 Union Proposal 13.

Exhibit 30: A copy of meeting notes indicating the Union's withdrawal of the 1989

Union Proposal #13 – to reinstate the clothes changing provision.

Dated this 8th day of September, 2008.

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No. 10-580

In The Supreme Court of the United States

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Petitioner,

v.

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDTSON, on behalf of themselves and all others who consent to become the plaintiffs and similarly situated employees,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Section 203(o) of the Fair Labor Standards Act allows collective bargaining parties to exclude time spent changing clothes from "hours worked" for the purposes of determining workers' rights under §§ 206 and 207 of that Act. Does § 203(o) preempt Wisconsin's more protective wage and hour laws, under which employers must compensate workers for such time?

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INTRODUCTION

The only question Kraft's petition fairly presents is whether Wisconsin law, which requires employers to compensate workers for time spent changing clothes, is directly at odds with § 203(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o). On that narrow question, Kraft has failed to identify any compelling reason why this Court should grant review. There is no circuit split, the Seventh Circuit's decision is consistent with this Court's well-settled approach to resolving claims of conflict preemption, and Kraft's dire predictions about the impact of the decision are overblown.

Kraft attempts to dress up its petition by drawing from myriad concepts scattered throughout labor law that do not apply to this case, asserting (in addition to the conflict preemption ground the petition presents) two other arguments for invalidating Wisconsin law aside from conflict preemption. Neither is cert-worthy—in no small part because Kraft has abandoned or settled a number of issues in this case, making it a poor vehicle for review.

For all these reasons, Kraft's petition for certiorari should be denied.

STATEMENT OF THE CASE

In a court-approved settlement reached after class certification and on the eve of trial, the parties

significantly narrowed the controversy before the court. As part of that settlement, the Plaintiffs dismissed some of their claims and agreed to limit their damages. Kraft, in return, withdrew all but two of its defenses, namely, that (1) § 203(o) bars Plaintiffs' FLSA claim for unpaid "donning and doffing" time because Kraft and the union representing its employees agreed in collective bargaining that Kraft did not have to compensate for such time; and (2) the Plaintiffs' state law claims are preempted by federal law. The parties agreed to a damages formula that Kraft would pay in full if the Plaintiffs succeeded in rebuffing either of the two defenses Kraft preserved under the settlement.

The parties then cross-moved for "final judgment" as contemplated by the settlement agreement. The district court rejected Kraft's conflict preemption arguments and ruled that Kraft was fully liable for damages under Wisconsin law; thus, the district court declined to rule on whether § 203(o) applied to bar the Plaintiffs' claims under the FLSA. (Pet. App. 20–27.) In its brief to the district court, Kraft noted that it had previously argued other theories of preemption aside from conflict preemption. But Kraft stated in its brief that, while it was not waiving those theories in its motion for final judgment, it also was not raising them "as independent grounds for preemption"; instead, it offered them "merely as further support" for its arguments on conflict preemption. (Kraft Mot. for Final J., Case No. 07-C-0300-C, Doc. No. 277, at 33 n.14 (filed Mar. 27, 2009).) The

district court ruled that "[a]lthough [Kraft] says it does not intend to waive those arguments, that is exactly what it has done by failing to develop them." (Pet. App. 21.) The court entered judgment for the Plaintiffs and instructed Kraft to pay class-wide damages in accordance with the agreed-upon damages formula. (Pet. App. 27.)

The Seventh Circuit affirmed. Writing for the court, Chief Judge Easterbrook stated that, by its plain terms, § 203(o) only goes so far as to allow a collective bargaining agreement to supersede the *FLSA's* wage and hour rules pertaining to time spent changing clothes. (Pet. App. 4.) With respect to *state laws*, in contrast, the court observed that the general savings clause in the FLSA (29 U.S.C. § 218(a)) expressly permits states to adopt more protective wage and hour rules than those imposed by federal law, and that "[n]othing in § 203(o) limits the operation of § 218(a)." (Pet. App. 5.) The court also noted that while no court of appeals had previously addressed whether § 203(o) preempts state law, all three district courts that had considered the argument rejected it. (Pet. App. 5.)

REASONS FOR DENYING THE PETITION

Kraft concedes that its petition does not raise any issue that has created a conflict among the circuits. (Pet. 9.) Thus, Kraft is left to argue that review is warranted because the Seventh Circuit's decision

conflicts with this Court's precedent, and that the case presents an issue of exceptional national importance. *See* S. Ct. R. 10(c). Those arguments fail. The Seventh Circuit followed this Court's teachings on conflict preemption in concluding that nothing in § 203(o) evinces a congressional purpose to preempt stricter state wage and hour laws with respect to donning and doffing time. All other issues that Kraft injects into its petition have been abandoned or settled and do not provide appropriate grounds for this Court to review the case. Furthermore, Kraft exaggerates the likely impact of this case and fails to demonstrate why it is important for this Court to resolve now the conflict preemption question that Kraft raises, instead of waiting to see how (and whether) the issue further develops in the lower courts.

I. The Seventh Circuit's Decision Followed this Court's Well-Settled Approach to Preemption.

This Court has laid two "cornerstones" of preemption jurisprudence that provide guidance in every preemption case. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). First, "'the purpose of Congress is the ultimate touchstone.'" *Id.* (citation omitted). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," courts must "start with the assumption that the historic police powers of the States were not to be superseded

by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1194–95 (2009) (internal quotation marks and ellipses omitted).

Congress may show a clear and manifest purpose to foreclose state action "by express language in a congressional enactment" (express preemption); "by implication from the depth and breadth of a congressional scheme that occupies the legislative field" (field preemption); or "by implication because of a conflict with a congressional enactment" (conflict preemption). *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). *See also English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990) (describing categories of preemption). Kraft does not assert that § 203(o) (or any other federal law) expressly bars States from adopting more protective laws on donning and doffing time; nor does it argue that Congress has occupied the entire field of labor law. Even if it had made those arguments, they would be foreclosed because this Court has made it clear that States retain "broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, [and] laws affecting occupational safety . . . are only a few examples." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Indeed, Congress "has never exercised authority to occupy the entire field in the area of labor legislation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To the contrary, the FLSA's savings clause, 29 U.S.C. § 218(a), expressly authorizes stricter state wage and

hour standards than those imposed under the FLSA, as the Seventh Circuit held. (Pet. App. 5.) *See Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) ("[T]he FLSA's 'savings clause' is evidence that Congress did not intend to preempt the entire field.").

That leaves conflict preemption. A state law may be preempted where it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (citation omitted). According to Kraft, Congress enacted § 203(o) in order "to protect . . . from governmental interference" any decision reached through collective bargaining as to whether time spent changing clothes is compensable, and, Kraft argues, Wisconsin law frustrates that purpose. (Pet. 17, 30–32.) The Seventh Circuit rejected this argument, however, because it cannot be squared with the text of § 203(o) or the FLSA's general savings clause, § 218(a). (Pet. App. 4.)

As the Seventh Circuit observed, "[t]he first words of § 203(o) are: 'In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed. . . .'" (Pet. App. 4 (quoting 29 U.S.C. § 203(o)).) Sections 206 and 207 set federal standards for minimum wages and overtime pay. Based on this text, the Seventh Circuit held that although § 203(o) permits collective bargaining parties to negotiate away rights to compensation *under the FLSA* for time spent changing clothes, nothing in the text of the provision—with its explicit reference to §§ 206 and 207—reflects a clear and

manifest congressional intent to limit the States' traditional authority to set more protective wage and hour rules. (Pet. App. 5.) To the contrary, the text of § 218(a) shows Congress expressly reserved that right to the States. (*Id.*)

Moreover, the Seventh Circuit's analysis closely tracks the path this Court has laid out for determining the intent of Congress. As this Court has repeatedly instructed, questions of congressional intent "begin[ ] with the statutory text, and end[ ] there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). *See also, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.") (citation omitted). The Seventh Circuit held that Congress unambiguously stated its intention in the statutory text. There was therefore no reason for the court to look any further. (Pet. App. 5.)

In its petition, Kraft goes about the analysis backwards. It leads by arguing from legislative history—both without acknowledging the explicit limitation in § 203(o) that the provision applies "for the purposes of Sections 206 and 207," and without identifying any ambiguity in the text. (Pet. 17–21.) *See, e.g., BedRoc Ltd.*, 541 U.S. at 187 n.8 (observing that longstanding precedent permits "resort to legislative history only

when necessary to interpret ambiguous statutory text."); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'") (citation omitted). When Kraft finally turns to the statutory text on which the Seventh Circuit based its decision (Pet. 34–37), moreover, it fails to provide any critical analysis, arguing instead that the statutory text should not be construed to "undermine the legislative purpose" as reflected in legislative history. (Pet. 36.)

Because Kraft does not identify any aspect of the Seventh Circuit's preemption analysis that conflicts with this Court's precedent, its petition should be denied.

II. The Other Grounds for Preemption Kraft Raises Were Abandoned or Settled and Do Not Merit Further Review.

Faced with the presumption against preemption in the area of wage and hour laws (which States have traditionally occupied) and the lack of any textual support in the FLSA for its arguments on conflict preemption, Kraft attempts to tap into other veins of labor law to support its petition, including preemption of claims enforcing collective bargaining agreements under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and field preemption of unfair labor practice claims under *Building & Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959). (Pet. 26–29, 32–34.) Kraft

asserts that the Seventh Circuit improperly disregarded those other grounds for preemption. (*Id.*)

Not only do those theories *not* apply here, but Kraft failed to preserve them when it moved for final judgment (the vehicle established by settlement for pursuing the preserved defenses). As noted, Kraft expressly disclaimed both § 301 and *Garmon* "as independent grounds for preemption" (Kraft Mot. for Final J. at 33 n.14); and the district court held that Kraft waived those arguments because it did not develop them in its brief to the court. (Pet. App. 21.) Kraft cannot revive issues in its petition for certiorari that it forfeited below. *See, e.g.*, *United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (holding that party forfeited argument by failing to raise it below); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below. . . .").

In any event, Kraft's only real argument for § 301 preemption of the Plaintiffs' state law claims is that a court would have to consult the collective bargaining agreement to calculate damages for unpaid time. (Pet. 28–29). And aside from the fact that Kraft did not make that argument in its motion for final judgment (perhaps because the meaning of terms in the collective bargaining agreement was never at issue), there are at least two other reasons why it is not worthy of review. First, the argument is directly contrary to the decisions of this Court. *See Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (holding that

"the mere need to 'look to' the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301"). Second, the argument was mooted by the parties' settlement agreement that set a formula for calculating damages, which the district court instructed the parties to follow when it entered final judgment. (Pet. App. 27.) Thus, there is no need to consult the collective bargaining agreement even to determine damages (or, for that matter, any other aspect of the Plaintiff's claims).

There is also no basis for this Court to review the Seventh Circuit decision based upon Kraft's arguments for NLRA preemption under *Garmon*. Consistent with the precedent of this Court, such preemption arises only where "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8"—not where the regulated activity is merely a "peripheral concern" of the NLRA. *Garmon*, 359 U.S. at 243–44. Kraft's only argument for preemption under *Garmon* (which also was not preserved in its motion for final judgment) is that "Wisconsin law here may be viewed as adding a remedy . . . where federal law has authorized parties to a CBA to exclude that remedy." (Pet. 34.) But the federal law at issue is the FLSA, not the NLRA; and Kraft fails to show how Plaintiffs' state law claims in any way implicate NLRA §§ 7 or 8 or interfere with the NLRA's primary jurisdiction to enforce those sections.

Kraft's other preemption arguments were not preserved, lack merit, and fail this Court's criteria for cert-worthiness. Accordingly, the petition should be denied.

III. Kraft Overstates Both the Import and Impact of the Seventh Circuit's Decision.

Kraft predicts a bleak and dreary future if the Seventh Circuit's decision is left to stand. According to Kraft, the decision undermines collective bargaining throughout the nation, unsettles innumerable agreements currently in place, and opens the floodgates to federal donning and doffing litigation. (Pet. 39–44.) These predictions are unsupported and cannot be taken seriously.

The Seventh Circuit's decision is unlikely to have significant impact beyond the issue of conflict preemption the court addressed. And even on that narrow issue, the decision is precedent only within the Seventh Circuit (and it is arguably even further confined to Wisconsin law). Thus, Kraft clearly overreaches in asserting that "the Decision creates a precedent pursuant to which each of the 50 States, every territory, and every municipality across the country may override even long-settled collective bargaining determinations" regarding compensation for time spent changing clothes. (Pet. 39–40.)

Kraft's argument about "opening the floodgates to litigation" is worn-out hyperbole. Of the asserted

"hundreds of cases . . . spawned" since this Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), very few of them even raise preemption as an issue. (The vast majority involve the scope and applicability of § 203(o) under federal law.) Indeed, it is telling that over the decades following the enactment of § 203(o), only a handful of district courts have considered whether that provision preempts state law, and in every one of those cases, as Chief Judge Easterbrook observed, the courts have rejected the conflict preemption argument Kraft raises here. (Pet. App. 5.)

Finally, Kraft fails to explain why it is imperative that this Court review the issue now, after only a single decision by a court of appeals. The far better course is for this Court to await further percolation in the lower courts.

CONCLUSION

For all the reasons discussed above, the petition for certiorari should be denied.

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No. 10-580

In The Supreme Court of the United States

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Petitioner,

v.

JEFF SPOERLE, NICK LEE, KATHI SMITH, JASON KNUDTSON, on behalf of themselves and all others who consent to become plaintiffs and similarly-situated employees,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTRODUCTION

In its Petition,[1] Kraft demonstrated that two of this Court's Rule 10(c) criteria support accepting review.

First, certiorari should be granted because this case presents an issue of vital national importance to American business. Congress passed Section 203(o) to promote the sanctity of CBAs and to allow employers and unions to resolve Clothes-Changing Compensation issues free from governmental interference. To emphasize this purpose, Congress used mandatory language in Section 203(o), noting that Clothes-Changing Time "shall be excluded" from hours worked when the issue was resolved by CBA. The submission by *Amici* – the American Meat Institute, National Meat Association, National Turkey Federation and National Association of Manufacturers (collectively "*Amici*") – further highlights that this case is of "compelling interest" to their members, who include the major participants in America's $4.5 trillion manufacturing sector and its meatpacking industry. Second, certiorari should be granted because the Decision below conflicts with this Court's controlling decisions, including authority requiring preemption under LMRA Section 301. As Kraft's Petition demonstrated, great harm to American business will inevitably result if the Decision is allowed to stand.

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[1] This Reply uses terms defined in the Petition.

In their slim Response, Respondents ignore, or at most cursorily address, Kraft's arguments. Instead, Respondents raise erroneous or straw-man arguments, including that:

- Section 203(o)'s reference to Sections 206 and 207, when considered in tandem with Section 218(a), purportedly shows that Section 203(o) is limited to federal law and permits state law that offers workers better terms. (Resp. 6-7). (When, in fact, Section 203(o) redefines for Sections 206 and 207 what constitutes an "hour worked" wherever Sections 206 and 207 are referenced in the FLSA, which includes Section 218(a), its savings clause).
- Kraft has waived its preemption arguments under § 301 and *Garmon*. (Resp. 1-2). (When, in fact, Kraft carefully preserved each preemption theory.)
- Kraft's detailing of the harm that will follow if the Decision is allowed to stand is "overblown." (Where, instead, Respondents fail to grapple with these risks.)
- Kraft cannot show a circuit conflict. (Where, because other Rule 10(c) criteria are met, no conflict is necessary).

ARGUMENT

I. Respondents Cannot Refute That Review Is Warranted Because This Case Presents A Question Of Exceptional National Importance.

Respondents acknowledge that "the purpose of Congress is the ultimate touchstone" as to whether state law is preempted. (Resp. 4). Yet, Respondents ignore Section 203(o)'s legislature history and only focus on one clause of Section 203(o)'s language – its reference to Sections 206 and 207 – and fail to consider Section 203(o)'s language as a whole. As Kraft showed in its Petition, proper deference to Congress' intent requires the preemption of state law that would include as an hour worked, time that Section 203(o) excludes.

A. Section 203(o)'s Text Supports Preemption Of State Laws That Interfere With CBA Provisions As To Clothes-Changing Compensation.

Like the Seventh Circuit, Respondents construe the opening clause of Section 203(o), which states that it is for determining the "hours for which an employee is employed" "for the purposes of Sections 206 and 207," as meaning that Section 203(o) only applies to federal law. (Resp. 6-7). They read Section 218 – which allows states to adopt more protective wage and hour rules than those imposed by federal law – as specifically empowering states to override

CBA terms regarding Clothes-Changing Compensation. (Resp. 3, 5-6). Both constructions are wrong.

Section 203(o) is located within the FLSA as part of a section of definitions applicable to the entire statute. The title shows that Section 203(o) defines "hours worked." The text that follows mandates that Clothes-Changing Time be excluded from "hours worked" for purposes of calculating a minimum wage per hour – Section 206 – or calculating the number of hours before overtime pay is owed – Section 207:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week invoked by [CBA].

(A66). In other words, Section 203(o) limits what may be treated as an hour worked under minimum wage or overtime law.

Sections 206 and 207 are specified because they are the only provisions of the FLSA that relate to hours worked. *E.g., Koelker v. The Mayor and City Council of Cumberland (Maryland)*, 599 F. Supp. 2d 624, 630 (D. Md. 2009) (" 'The two central themes of the FLSA are its minimum wage and overtime requirements,' and the FLSA is 'clearly structured to provide workers with specific minimum protections against excessive work hours and substandard wages.' Section 206 of the FLSA established the minimum wage

requirements, and Section 207 governs maximum work hour limitations and overtime.") (citation omitted).

Nor does Section 218(a) lead to a different result. It provides that:

> No provision of this Chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Chapter or a maximum workweek lower than the maximum workweek established under this Chapter.

(A68). First, Section 218 incorporates the hours definition set forth in Sections 206 and 207. When Section 218 speaks of the "minimum wage established under this Chapter," that means Section 206. When it refers to the "maximum work week established under this Chapter," that means Section 207. Therefore, if Clothes-Changing Time has been excepted from hours worked as to these sections, it has been excepted for Section 218. Section 218 does not mention Section 203(o) or in any way purport to limit Section 203(o). Nothing in Section 218 allows states to redefine Clothes-Changing Time as part of a workday hour when Section 203(o) would exclude this.

As *Amici* put it well:

> FLSA Section 218(a) does not save the Wisconsin law from preemption. A state law that defines "hours worked" to include time spent in activities covered by Section 203(o) does

> not shorten the maximum workweek or raise the minimum wage as permitted by Section 218(a). It simply defines which activities constitute "work," a matter not addressed by 218(a), and not "saved" for state interpretation, regulation or change. Thus the state law here does not fall within the parameters of Section 218(a) permitting states to set higher minimum wages and shorter maximum workweeks. Congress did *not* reserve to the states a definition of "hours worked" in Section 218(a), but *did* reserve to collective bargaining the right to define "hours worked" for the limited area of Clothes-Changing Time.

(Brief of *Amici* 25). Thus, Wisconsin could require employers to pay $1 more per hour for activities properly considered "hours worked," but it may not include as an hour time that Section 203(o) excludes from that definition.

B. Section 203(o)'s Legislative History Confirms Congress' Intent To Protect CBA Provisions As To Clothes-Changing Compensation From Governmental Interference.

Like the Seventh Circuit, Respondents ignore Section 203(o)'s legislative history. Yet, this history demonstrates that the Decision below improperly allowed state law to displace the CBA as the determining factor regarding the issue of Clothes-Changing Compensation, revealing that Congress wanted the

issue of Clothes-Changing Compensation "to be carefully threshed out between the employer and employee." (A76). Yet the Decision below lets states or municipalities trump that "careful thresh[ing] out." Congress wanted to prevent a court from second-guessing an employer and requiring the payment of back wages for "time which everybody had considered was excluded as a part of the working day." (A76). Yet, the Decision requires Kraft to pay for hours that it and the Union had agreed to exclude from the working day for more than 24 years.

Congress wanted to restore "sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement [as to Clothes-Changing Time]." (A76). Yet, the Decision instead substituted state or local law as that determining factor.[2]

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[2] Citing *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176 (2004) (Resp. 7), Respondents ask this Court to ignore the legislative history behind § 203(o) because, as they see it, the text is unambiguous. But as § I.A above confirms, § 203(o) is plainly subject to diverging interpretations. Moreover, this Court has departed from the plain meaning rule when acceptance of that rule would thwart the obvious purpose of a statute. *See Johnson v. U.S.*, 529 U.S. 694, 706 n.9 (2000).

II. Respondents Cannot Refute That Review Is Warranted Because The Decision Conflicts With Controlling Decisions Of This Court, Which Require Preemption.

A. Kraft Did Not Abandon Any Preemption Argument.

Respondents argue that this case is a "poor vehicle for review" because Kraft purportedly "abandoned or settled" certain issues. (Resp. 1). Yet, Respondents cite record passages that instead prove that Kraft specifically preserved each of its preemption theories. Thus, Respondents acknowledge that below, Kraft specifically preserved that "the state law claims are preempted by federal law." (Resp. 2). Respondents imply that Kraft was not pursuing its labor-related theories of preemption as separate bases for relief by misleadingly quoting out of context from Kraft's Memorandum In Support Of Its Motion For Final Judgment to the District Court ("MFJ") (Dkt. No. 277), but, even as to the memorandum, Respondents acknowledge that "Kraft stated in its brief that it was not waiving those theories." (Resp. 2).[3] Kraft did not

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[3] The footnote Respondents quote from confirms that Kraft was preserving its full array of preemption arguments:

> Kraft previously discussed this law in conjunction with its original motion for summary judgment and recognizes that the Court found it inapplicable to the record as developed at that time. While Kraft does not waive those arguments, it will not raise them in the present motion as independent grounds for preemption.

Id. at 33 n.14.

restate its full argument as to these issues in its MFJ because the District Court already had rejected these theories in denying Kraft's earlier motion for summary judgment and it would have been futile to fully restate what the district Court refused to consider. The text of the MFJ provides:

> As further support for the propriety of preemption here, it is worth noting that Congress and the courts have a long history of preempting state laws that purport to regulate fields within the area of labor and employment law. A common thread connects this line of labor-related preemption doctrines: each strongly favors preemption of state laws that intrude upon what Congressman Herter characterized as the "sanctity [of] the collective-bargaining agreements[.]" 95 Cong. Rec. 11210 (1949) (comments of Rep. Herter). Congress intended to grant "sanctity" to such agreements when it passed § 203(o), just as it intended to give sanctity to the collective bargaining process and the substance and interpretation of collective bargaining agreements under the *Garmon*, *Machinists*, and Section 301 preemption doctrines Kraft cited in its previous motion.

(MFJ 33-34) (footnote omitted).

When Kraft appealed to the Seventh Circuit, it continued to fully pursue each of its theories of preemption. Respondents do not advise this Court that they spent three pages of their appellate brief raising the same waiver argument. Kraft, in its reply,

explained why this argument was erroneous. Although the Decision rejected Kraft's preemption arguments, it made no finding of waiver. Thus, each of Kraft's preemption theories remains fully intact before this Court, making this case an excellent "vehicle" for the Court's review.

B. Respondents Misconstrue Kraft's Section 301 Argument And Ignore This Court's Controlling Authority Under Section 301 That Requires Preemption.

In its Petition, Kraft argued that Section 301 requires preemption because it directs courts to apply a body of uniform national law to resolve issues as to the collective-bargaining process and the meaning of CBAs and preempts inconsistent local rules. (Pet. 26-27).

Kraft emphasized that these principles ran through three key decisions of this Court dating back 33 years, including *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957), holding that Section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." (cited Pet. 26); *Teamsters v. Lucas Flour*, 369 U.S. 95, 104 (1962), holding that "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules," (Pet. 27), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), holding that preemption extended to state and

local laws that impacted the meaning of CBA terms. (Pet. 27).

There is no way to square the Decision below with this authority, nor do Respondents even try. They ignore *Textile Workers* and *Lucas Flour* in their entirety and cite to *Allis-Chalmers* solely to quarrel with an argument Kraft does not make – that Congress has not occupied the entire field of labor legislation. (Resp. 5). Instead of responding to what Kraft actually says about Section 301, Respondents substitute a straw-man argument, asserting in error that Kraft's "only real argument" for Section 301 preemption is "that a court would have to consult the collective bargaining agreement to calculate damages for unpaid time." (Resp. 9-10). Instead, Kraft's Section 301 argument is that the Decision below disrupted the uniform application of law sought by Congress and altered the meaning of Kraft's CBA. (Pet. 28-29).

As to uniformity, the CBA between Kraft and the Union is now subject to one interpretation for purposes of federal law and another under Wisconsin law. Moreover, identical provisions in CBAs in other Kraft CBAs, which extend to employees in other states (Iowa and Illinois), may be subject to yet a third interpretation under Iowa law and a fourth under Illinois law.[4] Uniformity means nothing if 50

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[4] In fact, Kraft alone has been sued in three additional lawsuits brought under Illinois wage laws raising claims for

(Continued on following page)

states and countless municipalities may dictate how they wish as to rules for Clothes-Changing Compensation, no matter what federal law or the applicable CBA would provide.

Regarding meaning, Respondents cannot dispute that the Decision indisputably allows states – here Wisconsin – to alter the meaning of the applicable CBA by redefining work hours to include Clothes-Changing Time, even where parties to a CBA – through bargaining and in exchange for valuable consideration – exclude such time. Additionally, the Decision allows Wisconsin to alter the CBA's bargained-for compensation structure. Workers get to keep the extra compensation they received for giving up Clothes-Changing Compensation, but receive such Clothes-Changing Compensation as well.[5]

Clothes-Changing Time, two of which involve Section 203(o)'s application under Illinois state law (*Curry* and *Whitmore*). *See Curry v. Kraft Foods Global,* No. 1:10-cv-01288 (N.D. Ill.); *Whitmore v. Kraft Foods Global, Inc.*, No. 1:10-cv-2518 (N.D. Ill.); *Porter v. Kraft Foods Global, Inc.*, No. 10-L-44 (Circuit Court of Champaign County, Illinois). Moreover, since the Petition was filed, Kraft has been sued regarding whether its CBA Clothes-Changing provisions also violate Iowa law. *See Peters v. Kraft Foods Global, Inc.*, No. 3:10-cv-00142 (S.D. Iowa).

[5] As Kraft explained in its Petition, the Wisconsin state wage laws are also preempted by Section 203(o) under the *Garmon* and conflict preemption doctrines. (Pet. at 30-34) Respondents claim that *Garmon* does not apply but, because collective bargaining is at issue, it does. Respondents' only challenge to conflict preemption is based on its flawed reading of Section 203(o).

C. The Harms That Will Follow If The Decision Is Not Reversed Are Very Real And Not "Overblown."

Kraft specifically detailed how the Decision will undermine collective bargaining. (Pet. 39-43). Here, a 24-year old CBA provision has now been undone. Knowing that any state or municipality may now displace a CBA provision as to Clothes-Changing Compensation, employers will be reluctant to bargain as to this in the future – fearing that they will be held to their end of the bargain while the Union will be freed from its concessions.

Respondents argue that this issue is not of great importance, first, because the Decision only is precedent in the Seventh Circuit. (Resp. 11). This ignores that, as the first appellate decision on an issue of vital importance to business, this Decision will motivate many states and municipalities to legislate in this area[6] (to the extent they have not already) and employees to sue. *See supra* n.4. The fear of a patchwork of incompatible approaches even for workers within several plants of the same company, is very real.

Nor is the prospect of vast amounts of new litigation exaggerated. Until now, there have been hundreds of cases challenging whether an item was "clothing"

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[6] For example, after Arizona enacted an e-verify law, many other states followed suit. *See Chamber of Commerce v. Whiting*, No. 09-115 (argued Dec. 5, 2010).

subject to Section 203(o) in a unionized facility. Previously, these challenges did not pursue preemption, because it was generally understood that, if an item was "clothing," Clothes-Changing Time was not counted as hours worked. Until this Decision, there was little authority to support that state law could override CBAs as to this issue. Now, since the Decision was issued, Kraft itself has been sued in four new cases over this issue. Whether or not the image of "floodgates opening" is otherwise overused (Resp. 12), here it is an apt metaphor.

D. This Court Should Not Wait For A Circuit Conflict Before Granting Review.

Finally, Respondents argue that certiorari should be denied because there is no conflict in the circuits. As Rule 10(c) shows, many criteria besides a circuit conflict support certiorari, including the importance of a case. *See Am. Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("the question being an important one of first impression under the LMRDA, we granted certiorari"), and where a decision conflicts with the Court's precedent, *see Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992).

Because of the Decision, bad law is now precedent. In the Petition, Kraft showed the harms likely to follow if this Decision is left to stand. Kraft's Petition presents the proper case and time for this Court

to rectify the Decision's misstep and to restore proper enforcement of Section 203(o).

CONCLUSION

Kraft's Petition should be granted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICI CURIAE* OF AMERICAN MEAT INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MEAT ASSOCIATION AND NATIONAL TURKEY FEDERATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae American Meat Institute ("AMI") is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed beef products. *Amicus'* member companies produce more than 95 percent of the meat products available in the United States. *Amicus curiae* National Meat Association ("NMA") is a national trade association that has been advocating the interests of the meat industry since 1946. NMA members include packers, processors, and distributors of meat and meat products. *Amicus curiae* National Turkey Federation ("NTF") is the only national trade association representing the turkey industry exclusively. NTF represents more than 95 percent of the turkey industry in the United States, including breeders, hatchery owners, growers, and processors.

There are more than 526,000 workers employed in the meat and poultry packing and processing industries in the United States. *Amici* members

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[1] Pursuant to Supreme Court Rule 37.2 the parties have received timely notice of the intent to file and have consented to the filing of this brief *amici curiae*. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici*, made a monetary contribution for the preparation or submission of this brief. Petitioner is a member of *amici*, but has not provided any financial support for this brief, other than its normal dues payments.

contribute to the U.S. Gross Domestic Product in an amount of more than $156 billion.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The manufacturing sector is responsible for over $4.5 trillion in sales each year.

Of the 500,000 plus workers employed by *amici* AMI, NMA and NTF members, about 60% are currently members of unions which represent their interests through collective bargaining. Over 11 million Americans are employed in the manufacturing sector, and over 1.5 million are union-represented. These union workers and their representative unions typically negotiate and execute collective bargaining agreements ("CBAs") for one or more years with *amici* members. Those CBAs govern the wages, hours and working conditions of the represented workers. In some cases, *amici* members and their unions have been parties to CBAs for decades. Many *amici* members and their unions have expressly addressed Clothes-Changing Time issues in CBAs, as did Petitioner here. Other *amici* members and

their unions have addressed Clothes-Changing Time through established customs and past practices under their CBAs.

Amici and their unionized members have a compelling interest in the question presented by this case. *Amici* members already are inundated with Clothes-Changing Time and other wage-hour lawsuits. In many cases, these are "hybrid" actions brought under both state and federal law. As noted, *amici* members have addressed Clothes-Changing Time issues both expressly and implicitly in their CBAs. They have done so in reliance upon Section 203(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(o), that reserves to unions and employers the right to negotiate and define in CBAs whether represented workers' Clothes-Changing Time will be compensable under the FLSA, or to achieve the same result through established customs and practices under a CBA. The Seventh Circuit's decision below calls into question, for the first time by a Circuit Court, the long-established express CBA provisions and practices of *amici* members, and their union-represented workers, as to Clothes-Changing Time.

If permitted to stand, the decision below deprives workers and their employers of the benefits struck through collective bargaining on this issue. The decision below also subjects represented workers and their employers to a potential patchwork of state and local laws and ordinances which intrude on their rights guaranteed under Sections 7 and 8 of the

National Labor Relations Act ("NLRA"), 29 U.S.C. §§157, 158, to organize and to bargain collectively over wages, hours and working conditions; Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §301, which provides the mechanism to enforce CBAs, and by Section 203(o) of FLSA, to collectively bargain for inclusion or exclusion of Clothes-Changing Time as compensable time under FLSA. The decision below could destroy the national uniformity of the law of collective bargaining desired by Congress and repeatedly recognized by this Court as appropriate. It also ignores the command of Section 203(o) reserving the issue of FLSA compensability for Clothes-Changing Time to collective bargaining for represented workers. The uncertainty, confusion and undesirable policy contained in the decision below have, and will continue to have, adverse effects on *amici* members and their represented workers by destroying the carefully-crafted compromises and long-established practices on compensability of Clothes-Changing Time contained in their CBAs. Such interference also denies workers and *amici* members the opportunity to freely negotiate, without state or local governmental interference, such compromises in the future. If not checked, state and local interference with this part of the collective bargaining process will likely continue to grow. The Court should act now to prevent such disruption.

Therefore, *amici* respectfully urge this Court to grant the Petition under Supreme Court Rule 10. This truly is a case of first impression as the Seventh Circuit recognized in its decision, Appendix 5 (hereinafter "App."). This is also a case of national importance extending far beyond the concerns of *amici* and their members which should be resolved by this Court as soon as possible.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The decision below interferes with long-established customs, practices and express CBA provisions of *amici* members. If allowed to stand, the decision below will adversely impact the rights of *amici* members, and their represented workers, to bargain and reach agreement on Clothes-Changing Time without state and local regulatory interference. Such a result should not be countenanced by the Court.

The primary purpose of Congress in enacting the National Labor Relations Act was to promote stability in labor relations and reduce the deleterious effects of unregulated combat between unions and employers. The 1947 LMRA amendments to the NLRA provided a CBA enforcement mechanism in Section 301 lacking under NLRA. Congress thus evinced a greater commitment to a uniform national labor policy with

passage of LMRA, as this Court has recognized repeatedly. This Court has often found that the need for such uniformity preempts state and local efforts to impose regulations and limitations impinging upon the process of collective bargaining engaged in by employers and workers and protected by Section 301, LMRA, 29 U.S.C. Section 301, and by Sections 7 and 8 of the NLRA, 29 U.S.C. Sections 157 and 158. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Amici believe multiple bases exist for finding that the state law at issue here is preempted. Specifically, Section 301 of the LMRA, 29 U.S.C. §301, and the doctrine of federal preemption, along with the preemption doctrines established by this Court in *San Diego Building Trades Council v. Garmon*, 395 U.S. 236 (1959), and *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976), all require that the State of Wisconsin's attempt here to interfere with collective bargaining is preempted, and that the decision below should be reversed.

Following controversy and uncertainty over the impact of the FLSA on Clothes-Changing Time issues negotiated by represented workers and employers, in 1949 Congress clarified its position both on the NLRA/LMRA and on the impact of the FLSA upon a specific aspect of collective bargaining with passage of Section 203(o). Section 203(o) mandates a "hands-off" policy *both* under FLSA and NLRA/LMRA when employers and their represented workers negotiate

questions of compensability for Clothes-Changing Time either expressly or through established customs and past practices.

It is inconceivable to *amici* that these Congressional commands were meant to apply *only* to claims for compensation under the FLSA, and not to similar claims under state and local laws. Such a result is, however, precisely what the decision below holds to be the case. The decision below is simply wrong. The need for uniformity of labor policy, and the protection of the rights of collective bargaining in Sections 7 and 8 of the NLRA, together with the specific protection of the particular facet of collective bargaining addressed in Section 203(o) of FLSA, can lead only to the conclusion that Congress meant to preempt collectively-bargained Clothes-Changing Time issues from regulation by state and local authorities.

ARGUMENT

REASONS FOR GRANTING THE PETITION

A. The Decision Below Interferes With Collectively-Bargained Agreements And With Long-Established Customs And Practices Of *Amici* Members And Their Represented Workers, And Thus Poses A Question Of National Importance Warranting Certiorari

Traditionally, *amici* members have relied upon the specific provisions of Section 203(o) to address Clothes-Changing Time either expressly in a CBA, as

did Petitioner here, or through established customs or past practices. Such reliance can hardly be misplaced given the language of Section 203(o):

> *Hours Worked* – In determining for the purposes of Sections 206 and 207 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the *express terms* of *or* by *custom* or *practice under* a bona fide collective bargaining agreement applicable to the particular employee. 29 U.S.C. §203(o) (emphasis added).

In its Statement of the Case, Petitioner recounted how, for more than a quarter-century, Petitioner and its union-represented workers *specifically* addressed the compensability of Clothes-Changing Time through collective bargaining. Petition, 3-4. Petitioner's experience is not unique among *amici* members. Many *amici* member-employers, through collective bargaining, have agreed to extend benefits to represented workers in exchange for removal or limitation of Clothes-Changing Time, and have memorialized those agreements in their CBAs, as did Petitioner.

Other *amici* member-employers have addressed this issue through established customs and operating procedures which do not appear in a CBA. Such implicit handling of the Clothes-Changing Time issue usually is termed an established "past practice."

Established customs and past practices cannot be changed or eliminated unilaterally by a unionized employer *except* through collective bargaining. These customs and practices are also *enforced* under the CBA's arbitration provision when disagreements arise (and may also be enforced through actions under LMRA Section 301, 29 U.S.C. §301). "In certain circumstances, custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties 'whole' agreement." Elkouri and Elkouri, *How Arbitration Works*, 606 (Sixth Edition, 2009, American Bar Association). An attempt to change past practice and the status quo without bargaining infringes on represented workers' rights under the NLRA, and will be deemed a violation of Sections 8(a)(1) and 8(a)(5) by the employer (interference with employees' Section 7 rights and failure to bargain over wages, hours and working conditions). 29 U.S.C. §§158(a)(1) and (a)(5); *Labor Board v. Katz*, 369 U.S. 736 (1962).

This case presents facts demonstrating an explicit trade between Petitioner and its represented workers. This trade was expressly memorialized in multiple CBAs which conferred extra benefits on employees through negotiations in exchange for elimination of claims for Clothes-Changing Time compensation. Petition, 3-4. The reasons for such an exchange by an employer are obvious and are shared by many *amici* members: the relatively small amount of time spent changing imposes a disproportionate administrative burden on employers to account and pay for such time as compensable time.

Employers are thus willing to confer, through negotiations and past practices, additional benefits in exchange for relief from that administrative burden. Employees are willing to forego this minimal pay in return for more certain and substantial benefits, as happened here.

The exchange may be reflected in a CBA provision, in a side letter of agreement, through a handshake agreement and through the process in which established customs and practices attain the status of "rights" under a CBA. In any of these circumstances, a change by the employer will lead to invocation of the CBA's arbitration provision to permit a third-party construction of the rights of the parties to continuation, change or elimination of compensability for Clothes-Changing Time. Consequently, to the extent represented workers assert a claim for unpaid wages under state or local laws, those claims are dependent upon analysis of the terms of the CBA.

Amici members often operate across a number of states and municipalities. These members historically have often engaged in a form of "pattern" bargaining. In those cases, either a single CBA or multiple, virtually identical contracts will apply across many states, cities and operations. Compensability of Clothes-Changing Time will be expressly determined through CBA language in some cases; in other cases the issue is resolved through custom and practice under the CBA. In either situation, permitting state and local governments to legislate Clothes-Changing Time deprives the parties of the benefits they agreed upon

through collective bargaining, and interferes with the process of collective bargaining itself.

To permit a shifting landscape of local laws on this issue interferes with existing agreements and will disrupt future negotiations. It runs the risk of treating similarly situated workers differently depending on location. It also adds tremendous complexity and expense to bargaining and destroys reasonable efforts at multi-state uniformity by *amici* members and their union-represented workers. Moreover, if such local legislation is not checked now, it will grow and add to the already heavy litigation and compliance burdens of *amici* members.

At a bare minimum, the decision below will require further bargaining by Seventh Circuit employers, including the potential for labor strife. It also places such employers at risk for state and local claims for Clothes-Changing Time, despite negotiated CBA provisions or established past practices governing this issue. In reality, the decision below reaches far beyond the Seventh Circuit. Employers who fail to act based on the decision below run great risks of liability under state and local laws outside the Seventh Circuit should the decision below be followed in other circuits. Such disruptions should not be countenanced by the Court, and state and local laws regulating compensability of Clothes-Changing Time should be preempted by federal law protecting collective bargaining of the issue.

B. The Decision Below Conflicts With The Tenets Of Congress And This Court That National Labor Policy Should Be Uniform, And Multiple Grounds Exist For Federal Preemption Of The State Law At Issue

1. The Protection And Enforcement Of Collective Bargaining Rights Under The NLRA And Section 301 Of LMRA Require Preemption

From the inception of the NLRA in 1935, Congress sought to achieve labor peace and stability by enshrining collective bargaining in federal law and establishing a national tribunal, the National Labor Relations Board ("NLRB"), to enforce those national policy objectives. 29 U.S.C. Section 151.

The need for a uniform national labor law was further refined in the Taft-Hartley Amendments to the NLRA, which became the Labor Management Relations Act ("LMRA") in 1947. The Congressional debates confirm the sanctity of collective bargaining, but also demonstrate a desire that a forum and mechanism other than the NLRB be established to enforce CBAs by permitting such actions in state and federal courts. *See* 93 Cong. Rec. 612-17 (1947) (statements of Rep. Hartley); 93 Cong. Rec. 1023-33 (1947) (statements of Sen. Taft). Section 301 was born from that desire and the debates.

It is from this historical background that the multiple doctrines determining that federal labor laws should preempt many state and local labor laws

arise. Of course, preemption doctrines all stem from the Supremacy Clause, which states: "[T]he Laws of the United States . . . shall be the supreme Law of the Land[.]" U.S. Const. Art. VI, cl. 2. Preemption may take various forms including express (when Congress explicitly states federal law preempts state law), field (where Congress has occupied an entire field with legislation) and conflict (state laws preempted because of conflict with federal laws). *See Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983). The doctrines are not rigidly distinct, and cases in one area may aid interpretation in another. *See English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). Permitting the states to interfere with the collective bargaining process through regulations such as those at issue here can only have an adverse impact upon a uniform national labor policy. This is especially true when the bargaining at issue is over a subject expressly authorized by Congress in Section 203(o).

This Court has held that regardless of whether Section 301 actions are brought in state or federal court, Section 301 itself requires application of federal substantive law fashioned from the policy of the national labor laws. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). Later, the Court again upheld Congress' interest in having uniformity in the law as it applied to CBAs by rejecting a theory that state courts remained free to apply individualized local rules under Section 301 in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962):

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . .
>
> * * *
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Id., 103-104 (citations omitted).

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court further broadened the scope of Section 301 preemption, holding that not only claims alleging breach of collective-bargaining agreements, but also claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties" preempt state law. *Id.*, 220; *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1342 (8th Cir. 1989) (citing *Lueck*). The need for such a rule is based on the need for uniformity in labor policy, and this is true even if Congress has not completely occupied the field.

> If the policies that animate §301 are to be given their proper range, however, the preemptive effect of §301 must extend beyond suits alleging contract violations. . . .
>
> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by

> relabeling their contract claims as claims for tortious breach of contract.

Lueck, 211 (citation omitted).

In order to determine what activities the union and the company agreed to exclude from paid time, and how many minutes the union and company agreed to pay for "hours worked" in donning and doffing activities, the lower court here will necessarily be required to examine the agreement in the CBA. In other words, to determine whether Plaintiffs are owed any unpaid wages under state law requires the lower court to interpret the CBA. Because the state claim here for Clothes-Changing Time requires the interpretation of the CBA between the Petitioner and its union, under well-settled precedent of this Court such a state law claim is preempted by Section 301 of the LMRA.

We recognize that the decision below characterizes the situation here as one in which parties collectively-bargained an agreement contrary to state law. To drive this point home, the decision below crafts an analogy – bargaining away speed limits – and rejects the parties' ability to do so. App. 7. The analogy is inapposite here. Speed limits are not within the purview of collective bargaining, nor would other unlawful activities, such as bargaining the right to discriminate on the basis of race or gender, fall within it. Indeed, such subjects would be deemed illegal subjects of bargaining. *See, e.g., Texas Co.*, 78 N.L.R.B. 971, 981-82 (1948); *Hughes Tool Co.*, 147

N.L.R.B. 1573 (1964). On the other hand, Congress in the NLRA protected bargaining over *wages*, *hours* and *working conditions*. Moreover, Section 203(o) *expanded* that endorsement into the *specific area* addressed through bargaining here: Clothes-Changing Time. This hardly constitutes bargaining about unlawful activity or even an area left to the purview of the states.

Whether addressed expressly in a CBA, as here, or through past practice and custom, Clothes-Changing Time issues clearly arise under and as part of CBAs. These issues can be arbitrated under CBA provisions. And their requirements can be *enforced* either by the National Labor Relations Board or through actions under Section 301. It is thus clear that, regardless whether Clothes-Changing Time is expressly defined in a CBA or is implicitly handled through past practice, any state law purporting to regulate such time is "inextricably intertwined" with a CBA which has been agreed to by the parties.

2. The *Garmon* and *Machinists* Doctrines Of Preemption Also Support Reversing The Decision Below Which Permits Actual Conflict With Federal Labor Law

Recognizing that the lines of preemption doctrines can be blurry, *amici* submit that the doctrines of *Garmon* and *Machinists* preemption add weight to the arguments supporting preemption addressed above. Although Congress may not have completely

occupied the field of labor law, this Court has defined, generally quite broadly, the extent of that occupation through its decisions. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." So, too, here Wisconsin's attempt should yield because it interferes with the protected Section 7 right to bargain, and with the Section 8 scheme to enforce those rights. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

In yet another case arising out of an attempt by Wisconsin to intrude on federal labor policy, *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court said:

> It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or *arguably* protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953), the *Garmon* rule prevents States not

> only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U.S., at 247. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict on overt policy." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

Id., 286 (emphasis added).

Such conflict, between Wisconsin's attempt here to regulate long-standing CBA agreements and the right to collectively bargain Clothes-Changing Time, is just what NLRA and Section 203(o) preempt. In its broadest sense, the state law directly conflicts with the rights to bargain protected by Congress. It certainly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Cf., Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 240 (1967). Even in a narrow sense, by imposing a "remedy" on the parties through a state law claim permitting monetary recoveries, the state injects itself directly into a specific area of collective bargaining which Congress expressly protected from such intrusion. If the Court is going to implement the will of Congress set out in the NLRA and Section

203(o), collective bargaining of Clothes-Changing Time is at a minimum, "arguably protected," and thus well within the scope of *Garmon* preemption.

This Court also has held preemption necessary to implement federal labor policy where, *inter alia*, Congress intended particular conduct to "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 140 (1976) (citation and footnote omitted). That is precisely and expressly what Congress did when it enacted Section 203(o), reserving Clothes-Changing Time issues to collective bargaining for represented employees and employers.

By expressly permitting the collective bargaining of Clothes-Changing Time in Section 203(o), Congress has stated its intention to allow the free market forces of such collective bargaining to operate exclusively in this narrowly-delimited area. Wisconsin's intrusion and economic regulation of Clothes-Changing Time ignores Congress' intent that this issue was to be dealt with exclusively through collective bargaining at unionized workplaces. As such, *Machinists* preemption also comes into play to compel reversal of the decision below and a grant of the Petition.

Chamber of Commerce v. Brown, 554 U.S. 60 (2008), is instructive in this regard. In *Brown*, California prohibited employers who received state funds from using such funds "to assist, promote or deter

union organizing." The Court held this law preempted under the *Machinists* doctrine. The Court noted that:

> *Machinists* preemption is based on the premise that "Congress struck a balance of protection, prohibition and laissez-faire in respect to union organization, collective bargaining and labor disputes."

Id., 65 (citations omitted). The Court noted the NLRA's express provisions regarding free speech in union organizing:

> The explicit direction to leave non-coercive speech unregulated makes this case easier, in at least one respect, than previous NLRA cases because it does not require us "to decipher the presumed intent of Congress in the face of that body's steadfast silence."

Id., 68 (citations omitted).

The Court went on to find that California's policy judgment on employer speech was "unequivocally preempted." *Id.*, 69. Here, Congress has not been steadfastly silent, but has expressly chosen to allow Clothes-Changing Time to the give-and-take of collective bargaining. Wisconsin's attempt here to impose its own views or restrictions upon such bargaining clearly intrudes upon Congress' explicit reservation of this issue to be determined through "the free play of economic forces," underlying the *Machinists* preemption doctrine. The Court cannot permit such an intrusion in contravention of Congress' will.

C. The FLSA Preempts State Law Because Congress Designed Section 203(o) To Protect Parties' Choices Made Through Collective Bargaining

The FLSA requires that employees be paid overtime compensation for "hours worked" in excess of 40 per week at a rate not less than one and one-half times the regular rate at which they are employed. 29 U.S.C. §207(a)(1). Under Section 203(o), time spent by employees in pre- and post-shift donning and doffing of clothes is excluded from the computation of hours worked if two conditions are met: first, the activities at issue must constitute "changing clothes" as that term is used in the statute, and, second, a bona fide collective bargaining agreement must exclude, by its express terms or by a custom or practice under the agreement, time spent changing clothes and washing from compensable working time. The first conditional issue of "clothes changing" is not relevant to the Petition here.

The legislative history of Section 203(o) reflects that its passage was part of Congress' ongoing efforts to curtail judicially expansive interpretations of the FLSA. Those efforts commenced with the Portal to Portal Act's passage in 1947, and they were expanded by Congress with enactment of Section 203(o) in 1949. Petitioner ably recounts the legislative history of these laws. *See* Petition, 17-21.

The Fourth, Fifth, Sixth and Eleventh Circuits have cited Section 203(o)'s legislative history to

support holdings that the purpose of this statutory provision is to leave the issue of payment for time spent "changing clothes and washing" to the collective bargaining process. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009), cert. denied, No. 09-1529, 2010 WL 2420333 (Oct. 4, 2010);[2] *Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007).

Section 203(o) is a definitional provision that should be construed broadly to preserve and uphold the integrity of the collective bargaining relationship. To avoid giving effect to Section 203(o), the decision below crafts another analogy, stating that Wisconsin is entitled to control the multiplier and multiplicand of time worked and hourly pay in regulating the workweek. (App. 5). As to the mathematical analogy, Congress expressly dealt with the issue by *commanding* in Section 203(o) that the collective bargaining process be respected, including by the states, and it removed from regulatory purview the donning and doffing issue, *so long as*, it was addressed through collective bargaining, as here. Thus, the "right" found in the decision below does not exist.

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[2] The denial of certiorari in *Sepulveda* bears no relationship to the issue in this case. *Sepulveda* did not address the preemption issue set forth in the Petition, but rather a question of whether "clothes changing" included the donning and doffing of certain types of protective and safety equipment.

Section 203(o) states "there *shall* be excluded any time spent in changing clothes . . . if agreed under a CBA or CBA customs and practice" (emphasis added). This Court has termed "shall" the "language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Certainly this type of language thus imposes a *mandatory* exclusion of bargained Clothes-Changing Time – mandatory both under FLSA and state laws effectuating it. Rep. Herter's use of the bakery industry for illustration in his statement on Section 203(o) referenced in the Petition at 18-19, and seen more fully at App. 75-78, clearly was not meant to limit the reach of the Section only to the bakery industry. So, too, his mention there of interference by Department of Labor representatives with collective bargaining was merely illustrative, and not limited only to the Department or meant to imply permission for such interference by other agencies, courts or states. The clear intent of Congress was to reserve issues of Clothes-Changing Time to collective bargaining whenever possible, and to protect the results of that bargaining from interference by all federal and state regulation. "[T]he question whether a certain state action is pre-empted by federal law is one of Congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Lueck*, *supra*, 208, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Congress' purpose, and its command for a "hands-off" policy on collective bargaining of Clothes-Changing Time could not be more clear, and thus preemption is proper.

FLSA Section 218(a) does not save the Wisconsin law from preemption. A state law that defines "hours worked" to include time spent in activities covered by Section 203(o) does not shorten the maximum workweek or raise the minimum wage as permitted by Section 218(a). It simply defines which activities constitute "work," a matter not addressed by 218(a), and not "saved" for state interpretation, regulation or change. Thus the state law here does not fall within the parameters of Section 218(a) permitting states to set higher minimum wages and shorter maximum workweeks. Congress did *not* reserve to the states a definition of "hours worked" in Section 218(a), but *did* reserve to collective bargaining the right to define "hours worked" for the limited area of Clothes-Changing Time. The over-expansive reading of the decision below of Section 218(a) does just what the Court cautions against in *U.S. v. Locke*, 529 U.S. 89 (2000). As in *Locke*, this Court should reject the decision below and "decline to give broad effect to [a] saving clause[ ] where doing so would upset the careful regulatory scheme established by federal law." *Id.*, 106.

The Seventh Circuit decision below ignores the clear Congressional purpose to protect collective bargaining over Clothes-Changing Time stated in the express command of Section 203(o). Despite repeated negotiations, an exchange of benefits and express CBA language, the decision below permits Wisconsin law to trump Congress' will as exemplified in the NLRA/LMRA and in Section 203(o). Thus, the decision below permits precisely what Congress forbids –

interference with collective bargaining, and in particular interference with bargaining over Clothes-Changing Time.

CONCLUSION

Amici members already face a deluge of lawsuits under the FLSA alleging various violations. In some cases, these suits have been brought due to changes in regulatory interpretations previously relied upon. Here, however, the decision below not only threatens long-established CBAs and bargaining relationships, it does so in the face of an express command by Conress that employers and their represented workers be left alone to resolve Clothes-Changing Time issues through collective bargaining. The decision below flies in the face of Congress' "hands-off" instruction contained in Section 203(o), as well as intruding into the sphere of collective bargaining generally protected by the NLRA and by LMRA Section 301. The decision below adds to the already-heavy FLSA litigation burdens of *amici* members, disrupts existing CBAs and future negotiations, and exposes *amici* members to the shifting kaleidoscope of state and local regulations from which Congress sought to protect them. In such circumstances, *amici curiae*, the American Meat Institute, National Association of Manufacturers, National Meat Association and National Turkey Federation, respectfully request the Court

grant the Petition and issue a writ of certiorari on the question presented.

Respectfully submitted,

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